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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
Oct. Term 1980

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a ballot initiative known as Proposition 1, which explicitly classifies school desegregation matters adversely and differently from other racial matters and from other educational matters, is inconsistent with Hunter v. Erickson, 393 U.S. 385 (1969) and thus unconstitutional under the equal protection clause of the Fourteenth Amendment.

2. Whether Proposition I, whose purpose and effect were to terminate effective school desegregation in the Los Angeles Unified School District and whose historical context was the previous implementation of the school desegregation plan, is inconsistent with Reitman v. Mulkey, 387 U.S. 369 (1967) or Village of Arlington Heights v. Metropolitan Housing Development

Corporation, 429 U.S. 252 (1977), and thus unconstitutional under the equal protection clause of the Fourteenth Amendment.

3. Whether Proposition 1, which had the purpose and effect of terminating effective school desegregation within the Los Angeles Unified School District, deprived minority school children of their vested right, secured by a previous final judicial judgment, to a desegregated education in violation of the due process clause of the Fourteenth Amendment.*

---

* PARTIES: The petitioners, are the minority students attending the minority segregated schools in the Los Angeles School District.

Respondent is the Board of Education of the City of Los Angeles.

Intervenors are Bustop, a corporation; Better Education for Students Today (BEST), an unincorporated association; Robert Loveland and Mary Keipp; Charles Dreebin, Megan Belcher, Jessica Friedman, Danny Friedman, Jason Friedman and Integration Project, an unincorporated association; United Teachers/Los Angeles, an unincorporated association.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the court below is reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980).

Other reported opinions in previous phases of the case are reported at 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); 69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977); 439 U.S. 1380 and 1384, 58 L.Ed.2d 88 and 92, 99 S.Ct. 40 and 44 (1978); ___ U.S. ___, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 19, 1980. Petition for rehearing was denied on January 14, 1981.

Petition for hearing in the California Supreme Court was denied on March 11, 1981.

By order dated June 1, 1981, Mr. Justice Rehnquist granted an extension of time to July 9, 1981 within which to petition for certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Article I, Section 7(a), as amended by Proposition 1 on November 6, 1979, states:

> ARTICLE 1. DECLARATION OF RIGHTS
>
> §7. Due process and equal protection; pupil school assignment and transportation
>
> (a) A person may not be deprived of life, liberty or property without due process of law or

denied equal protection of the laws; 1/ provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a

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1/ What follows is the amendment, Proposition 1.

court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in

> the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel and protecting the environment.

Section 1 of the Fourteenth Amendment to the United States Constitution states in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the important question as to the constitutionality under the Fourteenth Amendment of Proposition 1 on the California Ballot of November 6, 1979, amending the California Constitution's equal protection clause, Article I, Section 7(a), concerning the desegregation of the minority segregated schools of the state. Specifically, the case involves the

desegregation of the minority segregated schools of the Los Angeles Unified School District which has been under a court order to desegregate those schools, but has not yet done so, since May 12, 1970.

The federal question sought to be reviewed was raised in the court of first instance, the Superior Court of the State of California for the County of Los Angeles, on December 19, 1979, by the petitioners herein in response to a motion by respondent to modify, pursuant to Proposition 1, desegregation orders of the Superior Court. The Superior Court did not decide the question, saying in its order of May 19, 1980:

> Petitioners in opposition seek to have the amendment to Article I, Section 7(a) declared unconstitutional. The mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions and the request for

such declaration is moot and will be denied.

The constitutional question was then raised before the Court of Appeal by respondent herein in its appeal from that May 19, 1980, order in its brief entitled "Appellant's Brief re Proposition 1," the heading on page 26 of which reads:

Proposition 1 is Constitutional

The constitutional question was likewise raised by petitioners herein before the Court of Appeal in their brief entitled "Reply of Respondents Crawford, et al to Board of Education's Brief on Proposition 1," Point I of which reads (pg. 8 of that brief):

> PROPOSITION 1 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION, DUE PROCESS AND SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION

The Court of Appeal passed upon the federal question by holding Proposition 1

to be constitutional saying (Appx. A hereto, pp. 50A, 69A-70A):

> The remaining question is the federal constitutionality of a state constitutional amendment conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment.
>
> * * *
>
> We conclude that Proposition 1 does not violate the federal constitution and that its application to this cause is constitutional under the Fourteenth Amendment.

The California Supreme Court rendered no opinion nor made any statement in denying hearing.

On May 12, 1970, after a 7-1/2 month trial, at which it found and concluded that respondent Board of Education had maintained and was intentionally maintaining a racially segregated school district, the Superior Court adjudged that respondent Board was under a duty to "evolve and adopt a meaningful Master

Plan of Integration, a plan that will realistically work within a reasonable period of time, eliminate segregated schools and create integrated schools, an integrated unitary school system." The judgment provided that the Board present the plan to the Court on or before July 1, 1970.

Instead of complying with the judgment the Board appealed, resulting in the California Supreme Court affirming the judgment in its entirety save that portion which defined segregated schools in terms of fixed racial and ethnic percentages (Crawford v. Board of Education), 17 Cal.3d 280, 285 [1976]).

The California Supreme Court approved the trial court's conclusion that the school district was intentionally segregated[2/] but did not rest its

2/ "The findings in this case adequately support
(Footnote 2 continued on next page)

decision on that characterization because it "continue[d] to adhere to [its] conclusion in Jackson [v. Pasadena City School District, 59 Cal.2d 876, 382 P.2d 878 [1963]] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation, 'regardless of its cause.'" The Board did not appeal.

Following remand and during the hearings that were being held in the Superior Court on the development of a plan to comply with the 1970 Superior Court and 1976 State Supreme Court orders, school board members who were less hostile to compliance with the court orders were replaced by recall and election by members pledged to resist the desegregation. The rubric was

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2/ (CONT'D.)
the trial court's conclusion that the segregation in the defendant school district is de jure in nature." (17 Cal.3d at 285).

opposition to "forced busing."[3/]

On February 7, 1978, over the objection of petitioners here who protested that the mandates were not being complied with, the Superior Court allowed the start in September, 1978, of a plan presented by the Board after a rejection, as wholly unconstitutional, of an earlier plan. The Superior Court held that the second plan also did not comply with the mandate but allowed its implementation as an important first step toward eventual compliance because the plan offered promise for amendments and modifications. The court ordered such additions and for further hearings to be held thereon. The plan the trial court allowed to go into effect contained some modest assign-

3/ Although forced busing had been declared illegal in California by its Supreme Court in 1971. (San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 479 P.2d 669).

ments for desegregation and desegregated somewhat some grades in a few minority segregated schools.

On November 6, 1979 during the hearings being held on the augmentation of the plan, Proposition 1 on the state's general election ballot was passed, 2-1. Its design was clearly to halt the desegregation that was going on in Los Angeles at the time and to prevent the enlargement of desegregation which appeared to be in the offing as well as to prevent "forced busing" in the other school districts in the state.

Almost immediately upon the passage of Proposition 1, the school board moved the trial court to be relieved of the little desegregation then going on and to be allowed to institute a so-called "voluntary" assignment system whereby, again, no minority segregated school

would be desegregated and where the burden of obtaining an integrated education would fall entirely on the victims of the segregation, the minority students and they alone. Petitioners here resisted the motion on the ground that Proposition 1, to the extent it allowed the result sought by the Board, was unconstitutional under the 14th Amendment to the United States Constitution. The Superior Court, as noted above, did not reach the constitutional issue. The trial court thereupon, after the hearings were concluded, and on default of the Board presenting a constitutionally acceptable desegregation plan that would comply with the 1970 and 1976 orders to desegregate the minority segregated schools, prepared its own plan.[4/] That

4/ The reasons the trial court rejected the plan the Board sought to implement by reason of Proposition 1 are explained in specific findings

(Footnote 4 continued on next page)

plan of the court, by its order of July 7, 1980, provided for somewhat more assignments for desegregation and desegregated some minority schools although it left untouched the most heavily segregated areas of the district.

On appeal, the Court of Appeal

4/ (CONT'D.)
by the court (CT 17538-39):

"30. That the plan of the respondents depends exclusively upon voluntary transfers of both white and minority children, requested and initiated by the parents of those children. That the respondent does not expect to desegregate minority schools by this plan, but to provide a desegregated experience for some minority children.

"31. That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools. That any success which may have been achieved is within its PWT program, which program is used exclusively by minority children [some 18,000 of them] to transfer on a daily basis from their minority schools to white schools, thus resulting in no desegregation of minority schools. That the history of magnet schools has also been one of failure to desegregate minority schools and has shown only limited promise in the creation of new desegregated schools.

"32. That the all-voluntary plan proposed by the respondent board holds no promise of meeting the mandate in the desegregation of minority schools."

reversed[5] the California Supreme Court and held the 1970 findings of the Superior Court insufficient to support the conclusion that the Board had engaged and was engaging in intentional segregation. Accordingly, the Court of Appeal held that the Superior Court had no right to have made the July 7 order which included assignments for desegregation. In so doing, it upheld the constitutionality of Proposition 1 which purported to deprive the California Courts of the effective power to require desegregation of California's segregated schools and retroactively overturned final desegregation orders, specifically that of Los Angeles, leaving over a quarter of a million minority youngsters, to say nothing of those in the past and yet to come, to a destiny of segregated

5/ This is not a typographical error.

education for their entire school careers.

Hence, this petition.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING WRIT

The decision of the California Court of Appeal below, upholding the constitutionality of Proposition Il, is in direct conflict with this Court's decisions in Hunter v. Erickson, 393 U.S. 385 (1969), Reitman v. Mulkey, 387 U.S. 367 (1969) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). The decision below also is in direct conflict with the decisions in the lower federal courts holding racial classifications unconstitutional under the equal protection clause of the Fourteenth Amendment. The decision below, depriving minority school children of their vested rights to a desegregated education, also

conflicts with basic principles embodied in the due process clause of the Fourteenth Amendment. Because of these conflicts, and because the decision below has allowed the will of the majority to subvert the rights of minorities by sanctioning the enactment of an unequal equal protection clause, this Court should grant this petition for a writ of certiorari.

I.

PROPOSITION 1 IS AN EXPLICIT RACIAL CLASSIFICATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

As we have explained, Proposition 1's purpose and effect were to terminate effective school desegregation within the Los Angeles Unified School District. The conditions existing prior to the adoption of Proposition 1 were those of school desegregation being accomplished.

The historical context is one of pre-existing school desegregation thwarted by Proposition 1. As such, Proposition 1 violates the equal protection clause of the Fourteenth Amendment in the same manner that an earlier proposition was found unconstitutional in Reitman v. Mulkey, 387 U.S. 369 (1967).

Here, however, the unconstitutionality of Proposition 1 need not rest even on Reitman. This is because "[h]ere, unlike Reitman, there [is] an explicitly racial classification treating racial housing [here, school desegregation] matters differently from other racial and housing [here, educational] matters." Hunter v. Erickson, 393 U.S. 385, 389 (1969).

A. By Treating School Desegregation Matters Differently From Other Racial Matters and From Other Educational Matters, Proposition 1 is Inconsistent with Hunter v. Erickson and Thus Unconstitutional Under the Fourteenth Amendment

Hunter v. Erickson, 393 U.S. 385 (1969), and its progeny control this case. As Circuit Judge Paul Hays wrote for a unanimous three-judge court more than a decade ago in Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971):

> "The principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." 318 F.Supp. at 718 (footnote omitted).

At issue in Hunter was §137 of the Akron City Charter, a popular referendum which had been adopted by a majority of the electorate. Section 137 effectively repealed Akron's fair housing ordinance, and made any future fair housing

ordinance ineffective unless adopted by the majority of the electorate. As this Court summarized in Hunter:

> "By adding §137 to its Charter, the City of Akron, which unquestionably wields state power, not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect. Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." 393 U.S. at 389-390 (footnotes omitted).

Because §137 created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters," 393 U.S. at 389, and because it was not sustained by a compelling state interest, the popular referendum was held unconstitutional.

The principle applied in Hunter is applicable not only to state eviscera-

tion of fair housing remedies but also to state evisceration of school desegregation remedies. Thus, in Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd., 402 U.S. 935 (1971), the Hunter principle was applied to a legislative enactment barring student assignment to achieve racial balance in the public schools. The state law, §3201(2) of the New York Education Law, prohibited appointed school boards, the State Regents, and the State Commissioner of Education "from assigning students, or establishing, reorganizing or maintaining school district, school zones or attendance units for the purpose of achieving racial equality in attendance." 318 F.Supp. at 712. Reviewing the constitutionality of this law, the three-judge court noted that the purpose of §3201(2) was to terminate the state officials' "policy

of eradicating de facto segregation." 318 F.Supp. at 716. But, in holding the state law unconstitutional, the court relied not on the purpose and effect of the law but only on the fact that the law was a racial classification no different from the referendum in Hunter:

> "Section 3201(2) . . . singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance. The Commissioner and local appointed officials are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the Hunter principle." 318 F.Supp. at 719.

The Hunter principle was also applied by the Ninth Circuit in Seattle School District No. 1 v. State of Washington, 638 F.2d 1338 (9th Cir.

1980), where the court affirmed the unconstitutionality of a state referendum known as Initiative 350. Like the state law in Lee, Initiative 350 differentiated "student assignment for purposes of achieving racial balance from student assignment for any other significant reason." 633 F.2d at 1344 (footnote omitted). Irrelevant was the fact that Initiative 350 did not on its face mention racial assignment, because the referendum "achieve[d] the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance." 633 F.2d at 1343. Based on the Hunter principle, Initiative 350 was declared an unconstitutional racial classification.

Three aspects of Hunter, Lee, and

Seattle are especially significant. First, the form of the racial classification is irrelevant. In other words, a racial classification is a racial classification whether adopted as part of a governing charter through a popular referendum as in Hunter, whether enacted as a state law by a state legislature as in Lee, or whether adopted as a state law through a state-wide referendum as in Seattle.

Second, Hunter, Lee, and Seattle established that there is no compelling state interest which can justify such racial classifications. As this Court observed in Hunter, 'a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of [the racial classification], but does not justify it." 393 U.S. at 392. Indeed, public opposition to

racial reassignment has never been constitutionally recognized as a compelling state interest. See, e.g., Cooper v. Aaron, 358 U.S. 1, 16 (1958).

Finally, it was entirely irrelevant to the analysis in Hunter, Lee, and Seattle that the initial rights and remedies provided to the racial minorities -- before the racial classifications removed those rights and remedies -- were never in the first place required by the Fourteenth Amendment. In other words, the initial fair housing ordinance in Hunter and the initial efforts at remedying de facto school desegregation in Lee and Seattle were themselves not obligatory under the Fourteenth Amendment. Nonetheless, the racial classifications that eviscerated those rights and remedies were unconstitutional.

In the instant case, Proposition 1

cannot escape the racial classification analysis of Hunter, Lee and Seattle. Proposition 1 expressly addresses and curtails "pupil school assignment" and "pupil transportation" in the context of school desegregation. It does not at all address other racial matters. And it does not at all address other educational matters. Instead, through an explicit racial classification, Proposition 1 takes from racial minorities the school desegregation rights and remedies previously guaranteed under the California Constitution.6/

To paraphrase this Court in Hunter, Proposition 1 is unconstitutional under

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6/ It is of no moment that Proposition 1 uses language which purports to accomplish this result — with regard to school desegregation and only with regard to school desegregation — by incorporating the standards of the equal protection clause of the Fourteenth Amendment into the equal protection clause of the California Constitution. This is because the constitutional analysis under

(Footnote 6 continued on next page)

the Fourteenth Amendment, for it is an explicit racial classification treating racial desegregation matters differently from other racial and educational matters. Indeed, as Judge Ely pointed out in Seattle, 633 F.2d at 1344: "Unless this Court affirms the relevancy of the constitutional analysis applied in Hunter and Lee to this case, the guarantee of equal protection of the laws will become a hollow shell."

B. Because of its Immediate Objective, its Ultimate Effect, its Historical Context, and the Conditions Existing Prior to its Adoption, Proposition 1 is Inconsistent with Reitman v. Mulkey and Village of Arlington Heights and Thus Unconstitutional Under the Fourteenth Amendment.

6/ (CONT'D.)
Hunter, Lee, and Seattle focuses on the existence of a racial classification. And, as pointed out in the text at p.25 , supra, it was irrelevant in Hunter, Lee and Seattle that the rights and remedies initially provided the racial minorities — and later eviscerated — were broader than was ever required by the Fourteenth Amendment. Proposition 1 created for California what surely must be prohibited under the Amendment: an unequal equal protection clause.

Preceded by blatant, overt legislation openly discriminatory against California's minorities, including decreeing separate schools for them[7] Proposition 1 is but the latest in a series of efforts by the majority of the state, by seemingly neutral and facially inocuous enactments, to discriminate against racial minorities. (See, e.g., Oyama v. California, 332 U.S. 633 [1948]; Reitman v. Mulkey, supra; San Francisco Unified School District v. Johnson, supra; Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 530 P.2d 605 [1979]).

In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265-66, 270 n.21 (1977), this Court held that a plaintiff alleging an equal protection violation need only show that discriminatory

7/ E.g. former California Education Code Section 8003 and 8004 were not repealed until 1947.

purpose was a motivating factor in the official act complained of and that the government entity has failed to show that the provision would have been enacted "even had the impermissible purpose not been considered."[8/]

8/ /Because the petitioners need not prove that a segregative purpose was either the sole or the dominant reason for the passage of Proposition 1, the appellate court erred in ruling that the legitimate purposes listed in Proposition 1 immunize it from constitutional attack. Even if those alleged purposes were among the reasons for enacting Proposition 1 — a suggestion refuted by the proposition's history, the ballot argument, the statements of its proponents, and its effects — they do not rule out segregative intent as a determinative factor. Since discriminatory purpose is seldom openly admitted, the recital of benign purposes cannot block further investigation. Arlington Heights requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. at 266. See United States v. Texas Education Agency, 579 F.2d 910, 913-14 (5th Cir. 1978) (Austin IV), cert.denied, 443 U.S. 915 (1979), rejecting the notion that benign motives preclude intentional discrimination; United States v. Texas, 498 F.Supp. 1356, 1363 (E.D. Tex. 1980): "Public pronouncements of good faith by state authorities in no way obviate an unconstitutional intent to discriminate."

The Court of Appeal erred in focusing on the voters' motives to insulate Proposition 1. Motive is not the same as intent or purpose.

(Footnote 8 continued on next page)

In recognition of the fact that discriminatory purposes are most often disguised, Arlington Heights suggested various factors as guidelines for discerning whether a particular action is infused in any way with discriminatory purpose. 429 U.S. at 266-268.

In Reitman v. Mulkey, 387 U.S. 369, 373 (1967), this Court approved similar analysis in terms of "immediate objective," "ultimate effect," historical context and the conditions existing prior to its enactment."

The evidence is overwhelming that

8/ (CONT'D.)
Cf., 1 Witkin, California Crimes, §54 (1963): "[A] person may intend to steal property, or to injure or kill another, and will be guilty of the crime regardless of his motive (e.g., need, avarice, revenge, jealousy, fear, etc.)."

Moreover, since the legislature placed Proposition 1 on the ballot, its intent is also subject to scrutiny. If either the legislature or the voters were motivated in part by discriminatory purpose, the burden shifted to the Board to show that the proposition would have been enacted even without that purpose. This has not been shown.

Proposition 1 is infected with an improper discriminatory purpose and that it meets the tests of both Reitman and Arlington Heights. In fact, the burdens to be placed upon minority children are barely disguised. When viewed in light of the history of racial discrimination in California,[9/] the arguments raised by the proponents of Proposition 1 in the election debate, public understanding in the media and the unambiguous pronouncements of the California courts concerning the urgent need to eradicate the continuing harm of segregated public schools in the State of California, there can be no doubt that Proposition 1 falls afoul of Reitman and Arlington Heights. See, Comment, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection

9/ See Appendix, p. 94A, et seq. for examples.

Clause, 10 Golden Gate U.L.Rev. 611, 665-681 (1980); Comment, Proposition 1 and Federal Protection of State Constitutional Rights, 75 Nw.U.L.Rev. 685, 730-733 (1980).

The reality of the burdens imposed by Proposition 1 on minority children is sufficient to establish a constitutional violation. Before the passage of Proposition 1 all persons in the State of California were entitled to the same equal protection under the laws under Article 1, Section 7 of the California Constitution and to effective remedies for the violation of those rights. Proposition 1 carves out a discrete exception to California's Equal Protection Clause for minority public school students seeking relief from the harmful effects of a segregated school system. For this class of minority children

alone, relief under the California Equal Protection Clause will be tied forever to the vagaries of changing federal decisional law, as that law may be applied to the facts existing whenever a Proposition 1 petitioner seeks to challenge an existing desegregation order or judgment. All other equal protection plaintiffs in California may look to the more expansive rights and remedies secured by the California Constitution. Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 903-04, 592 P.2d 314, (1979), aff'd, __U.S.__, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); People v. Pettingill, 21 Cal.3d 231, 247, 578 P.2d 108, 145 Cal.Rptr. 861 (1978); Serrano v. Priest, 18 Cal.3d 728, 762, 557 P.2d 929, (1976); Bustop Inc. v. Board of Education, 439 U.S. 1380 (1978). Only minority students seeking freedom from segregation are not

the beneficiaries of the California Constitution which provides, or did until the passage of Proposition 1, that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I, §24.

As is clearly shown by the media response, (see Appendix, p. 103A-104A) Proposition 1 was designed not with abstract constitutional theory in mind, but with the purpose of imposing enormous litigation burdens on a select class of racial minorities, the minority plaintiffs in this case. Proposition 1 is a direct response to an unbroken chain of California cases which refuse to permit recalcitrant school boards to place additional litigation hurdles in the path of minority children seeking their right to an equal education. See,

e.g., Crawford, 17 Cal.3d at 300 ("the litigative task involved in such an effort [distinguishing de jure from de facto segregation] would be an enormous one, imposing tremendous burdens on representatives of minorities . . . ."). It is precisely the imposition of those enormous litigation obstacles on minority children which the proponents of Proposition 1 sought to manufacture as a last ditch attempt to evade the desegregation of the Los Angeles public schools which is required in this case.

The imposition of such unequal litigation burdens upon minority children seeking to alleviate the harms of school segregation are analogous to -- but even more onerous than -- the special electoral burdens the Akron amendment placed upon persons seeking the passage of ordinances barring discrimination in housing. See,

Comment, supra, 10 Golden Gate U.L.Rev. at 642-45; 75 Nw.U.L.Rev. at 724.

Apart from the imposition of litigation burdens, Proposition 1 cruelly deprives minority children of their rights, secure since Jackson v. Pasadena City School District, 59 Cal.2d 876, 881, 382 P.2d 878 (1963), and specifically adjudicated in this case, 17 Cal.3d 280, to be free from the harmful effects of segregation regardless of its cause. These harmful effects form the fundamental basis for the principles of California Equal Protection law which Proposition 1 seeks to dismantle. Crawford, 17 Cal.3d at 301. The fact of this continuing harm was clearly known to the proponents of Proposition 1; yet they deliberately chose to impose these onerous burdens on minority children alone.

The superficial racial neutrality of Proposition 1 cannot insulate it from equal protection attack. This Court in North Carolina Board of Education v. Swann, supra, 402 U.S. 45-46, invalidated an apparently neutral, color-blind prohibition against student assignment on the basis of race because, read against the background of segregation, it "would render illusory the promise of Brown v. Board of Education . . . ." See also, Lane v. Wilson, 307 U.S. 268, 275, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (the law condemns "sophisticated as well as simple-minded modes of discrimination").

The language of the Proposition "is an obvious pretext for racial discrimination."[10/] See, Personnel Administrator

10/ Far from "specifically embracing" the Fourteenth Amendment, as the appellate court ruled,

(Footnote 10 continued on next page)

v. Feeney, 442 U.S. 256, 272 (1979), citing, e.g., Yick Wo v. Hopkins, 118

10/ (CONT'D.)
Appendix at 63A, Proposition 1 incorporates only the narrow segment of it that might serve to prevent effective desegregation in Los Angeles. Instead of disadvantaging all Californians alike, Proposition 1 carves out a single exception that affects a single class of disfavored litigants. The amendment of the entire California equal protection clause to conform to the federal one, though regrettable, would presumably be constitutional, except insofar as it would disturb rights previously vested under separate state equal protection guarantees. Such action would inflict equal deprivations upon all persons in the state.

Similarly, California might conform its present restrictive search and seizure laws to the less restrictive search and seizure provisions of the Fourth Amendment. The state could not, however, remove its search and seizure protections from one unpopular class of criminal defendants only, leaving the California provisions intact for other defendants -- especially not if the disfavored class, though described in neutral language, was in fact based upon race. Such state actions would violate the Fourteenth Amendment for the same reasons that Proposition 1 violates it.

The self-serving purposes alleged in Proposition 1 as the reasons for its enactment are no more than a transparent attempt to mislead the courts. Similar interests have never been found sufficient to sustain racial discrimination. See, e.g., Norwood v. Harrison, 413 U.S. 455, 466 (1973) (good educational intentions); Watson v. City of Memphis, 373 U.S. 526, 537 (1963)

(Footnote 10 continued on next page)

U.S. 356 (1886), and Gomillion v. Lightfoot, 364 U.S. 339 (1960). School desegregation plaintiffs today are as inevitably racial and ethnic minority children as owners of prohibited wooden laundries in San Francisco in 1885 were Chinese, see, Yick Wo, or as voters removed from the redrawn city limits of Tuskegee, Alabama in 1960 were Negro, see Gomillion. Proposition 1 "embraces" the Fourteenth Amendment only insofar as necessary to devastate the rights of minority children to a desegregated

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10/ (CONT'D.)
(expense); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (public disorder); Weaver v. Palmer Bros., 270 U.S. 402, 415 (1926) (inconvenience).

Moreover, the proponents of Proposition 1 do not find these interests compelling when they tout "voluntary" busing. Buses carrying minority students to predominantly white schools use the same amount of fuel per mile and endanger the busriders' safety to the same degree as buses carrying children of both races in a two-way desegregation plan. The difference is that a "voluntary" plan places the burden predominantly upon minority students and does not desegregate minority segregated schools.

education. For everyone else -- indeed, even for minority children seeking to vindicate some other, less unpopular constitutional right -- the California equal protection guarantees remain intact.

The other factors referred to in Arlington Heights further establish a constitutional violation. Proposition 1, when viewed in the context of the long history of racial discrimination in public education in California, and in light of the unmistakable purpose of its proponents of blocking the desegregation efforts mandated by the California courts, is clearly infused with improper discriminatory purpose. More specifically, Proposition 1 is a response to the proceedings in this case.[11/]

11/ For an outline, see Comment, California's Anti-Busing Amendment, supra, 10 Golden Gate U.L.Rev. at 665-681. E.g., the proponents of the Proposition in their ballot argument stated: "Proposition 1 does everything the people of

(Footnote 11 continued on next page)

In Reitman v. Mulkey, 387 U.S. 369, (1967), this Court was faced with a

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11/ (CONT'D.)
California may legally do to stop court-ordered forced busing in Los Angeles . . . ." Media coverage reiterated this characterization, thus conveying to the public the understanding that Proposition 1 would indeed hinder desegregation in Los Angeles. See Appendix, pp. 103A-104A.

The sequence of events and legislative history reinforce the plain intent of Proposition 1. After this case was filed in 1963, the plaintiffs repeatedly asked the Board to begin voluntary desegregation. Crawford, 17 Cal.3d at 287. The Board refused, even though some desegregation measures were "unquestionably feasible." Id. at 307. Only after its unsuccessful appeal did the Board formulate its first desegregation plan, which the trial court found constitutionally inadequate. (Order of July 5, 1977). Meanwhile, on June 20, 1977, Senate Constitutional Amendment 48 -- an anti-busing proposal -- was introduced in the Legislature. Comment, 10 Golden Gate U.L.Rev. at 674 n. 307. After the Board presented a second desegregation plan, Plan II, with some mandatory assignments for desegregation, State Senator Alan Robbins began trying to place an anti-busing constitutional amendment on the ballot as an initiative. In January 1978, however, SCA 48 was rejected by an Assembly Committee.

Over the months that followed, anti-desegregation groups began a campaign to recall school board president Howard Miller. In November 1978, court-appointed desegregation experts recommended a metropolitan desegregation plan, reaching suburban districts as well as Los Angeles. In December, Senate Constitutional

(Footnote 11 continued on next page)

similar attempt to subvert the rights of minority persons to equal protection

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11 / (CONT'D.)
Amendment 2 — which would become Proposition 1 - was introduced in the Legislature. It was subsequently approved, despite a warning from the Legislative Counsel that the measure could not constitutionally "extinguish any rights existing at the time of its adoption to the extent that such a result would amount to de jure segregation. . . . ." In June 1979, after the successful recall of board president Miller, the Legislature voted to bypass regular election procedures and hold a special election on Proposition 1 in fall 1979.

When this Court's decisions in Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II), in July 1979 appeared to diminish Proposition 1's prospects for halting school desegregation in Los Angeles, Senator Robbins introduced Senate Bill 1244, designed to increase plaintiffs' burden of proof in desegregation cases in California. (The Legislature passed it, but Governor Brown vetoed it. See Comment, supra, at 666 n. 251.) On October 30, 1979, the California Attorney General and Secretary of State issued procedurally "highly unusual" statements 'clarifying' the meaning of Proposition 1. See Comment at 680. On November 6, 1979, the voters approved Proposition 1. It contained the extraordinary feature that all courts in the state must give Proposition 1 proceedings precedence "over all other civil actions."

This sequence of events, along with the long history of racial discrimination in California, the overt pronouncements of Proposition 1's legislative proponents, and the departure

(Footnote 11 continued on next page)

under the law. Reitman involved an attempt by the voters of California to invalidate earlier statutes prohibiting private discrimination in housing sales and rental by the passage of Proposition 14 in 1964. Proposition 14, like Proposition 1, was worded with deceptive neutrality:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

However, the Court pierced these neutral terms to expose the discriminatory purpose which motivated the passage of

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11/ (CONT'D.)
from the norm, both substantively and procedurally, which led up to the adoption of, and are contained in, the enactment, see Comment, supra, at 677-678, leaves no doubt that Proposition 1 was segregative in intent. The requirements of Arlington Heights and Reitman have been fulfilled.

Proposition 14.

In affirming the decision of the California Supreme Court (64 Cal.2d 529 [1966]) striking down Proposition 14 on equal protection grounds, this Court approved the California court's judgment that:

> [T]he State had taken affirmative action designed to make private discrimination legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decision"; §26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." 387 U.S. at 375-376 (emphasis added).

Similarly, by the passage of Proposition 1, the State became a partner in the efforts to thwart desegregation. By prohibiting the only remedies that might effectively desegregate, Proposition 1 "involves the state in the preservation of such segregation." San Francisco

Unified School District v. Johnson, 3 Cal.3d 933, 946, 958 (1971). School boards wishing to avoid their duty to desegregate their minority segregated schools may now invoke express constitutional authority to do so. Proposition 1 is not a neutral enactment.[12/]

The historical context," "ultimate effect" and "immediate objective" of Proposition 1 present an even stronger example of purposeful discrimination than the circumstances presented in Reitman. The history of racial

12/ Indeed, by creating a state-wide rigid neighborhood assignment policy Proposition 1 has bestowed "government force upon . . . private decisions to impose racial discrimination," (Johnson, supra, 3 Cal.3d at 953). This Court has recognized the effect school assignments have upon the creation of segregated neighborhoods. Columbus Board of Education v. Penick, 443 U.S. 449, 465, n.13 (1979); Keyes v. School District No. 1, 413 U.S. 189, 202-3 (1973); Swann, supra, 402 U.S. at 20-22. See, also, Adams v. United States, 620 F.2d 1277, 1291-92 (8th Cir. 1980), cert.denied 49 U.S.L.W. 3246 (Oct. 6, 1980). See generally, Kushner, Apartheid in America.

discrimination and segregation in the California public school system is as long as the history of housing discrimination relied upon in Reitman. See Appendix, p. 97A. Just as the proponents of Proposition 14 sought freedom from state anti-discrimination measures -- in effect, a right to discriminate -- the proponents of Proposition 1 seek the right to maintain a segregated public school system.

Seattle School District No. 1 v. Washington, supra, 473 F.Supp. 996 (W.D. Wash. 1979), affirmed on other grounds, 638 F.2d 1338 (9th Cir. 1980) represents the appropriate synthesis of the pertinent federal case law applicable to measures such as Proposition 1. In Seattle School District No. 1 a federal district court struck down an anti-busing initiative (Initiative 350), similar in

purpose and effect to Proposition 1, which arose in a context remarkably similar to the within case.

The Court in Seattle School District No. 1 found that Initiative 350 constituted a racial classification in that it enumerated a variety of bases upon which student assignments could be made but conspicuously omitted the assignment of students for racial balancing purposes. Thus, although Initiative 350 did not contain any explicit racial classifications, the Court looked beyond the superficial neutrality of its terms and based its decision on the obvious effect and purpose of the statute. 473 F.Supp. at 1012-1013. The obvious effect of Initiative 350 was that only minority children would bear the burden of its prohibitions.

The court also found that the

passage of Initiative 350 was infused with purposeful discrimination when analyzed within the framework suggested by Arlington Heights, supra. As the Court explained:

> Beyond question the informed voters of the State, and the voters in general in Seattle, were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students. Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students. 473 F.Supp. at 1015.

The Court emphasized the special significance of recognizing the reality of this obvious burden on minority children within the analytical framework suggested by Arlington Heights. In particular, where the adverse consequences of a law upon a minority are

inevitable "a strong inference that the adverse effects are desired can reasonably be drawn." Id.; citing Personnel Administrator of Massv. Feeney, 442 U.S. 256, 279 n. 25 (1979).

The Court next reviewed the historical context of Initiative 350 and found that it was clearly adopted with the specific purpose of overriding the Seattle School Board's decision to attain a racial balance in Seattle schools through pupil assignments. The Court again explained:

> One must assume therefore that the voters, in adopting the initiative, intended to accomplish the very purpose for which the initiative was designed and intended therefore the disproportionate racial impact which its implementation will have. Id. at 1015.
>
> * * *
>
> The historical backgound and sequence of events leading up to the adoption of the initiative reveals a whole series of lawsuits

> and a recall election, the objective of which was to prevent the racial balancing of Seattle schools by means of mandatory student assignments.[13/] It reveals, too, that the adoption of the plan of racial balancing by the Seattle School Board was the event which gave rise to the thought of a statewide initiative as a means of thwarting that decision. Id. at 1015-1016.

The court also found that Initiative 350's sudden intrusion of the public into areas which had traditionally been the autonomous function of school boards -- i.e., pupil assignments -- was another indicator of discriminatory purpose. Id. at 1016.

The case stressed the constitutional invalidity of Initiative 350's interference with attempts to promote racial balance in the public schools, without

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13/ Los Angeles had its recall election of the Board President and its law suits for the same objective. CT 14166-14197; Bustop v. Superior Court, 439 U.S. 1380 and 1384 (1978); Board of Education of the City of Los Angeles v. Superior Court, ___ U.S. ___, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980).

regard to the de facto/de jure distinction. 473 F.Supp. at 1013. See also, Lee v. Nyquist, supra, 318 F.Supp. 710 (W.D.N.Y. 1970) aff'd, 402 U.S. 935 (1971).

See also, School Committee of Springfield v. Board of Education, 366 Mass. 315, 319 N.E.2d 427 (1974), cert.denied 421 U.S. 947 (1975). In that case, after a court had ordered Springfield to desegregate, the Massachusetts Legislature passed an act which prevented the State Board of Education from ordering pupil assignments or transportation for desegregation. The power of the local school boards, there called "School Committees," to employ such methods was not impaired. Thus, the Massachusetts enactment was virtually identical with Proposition 1 except there the state agency that was shorn of power was the

State Board of Education. Here it is the courts. The Supreme Judicial Court of Massachusetts held the legislation unconstitutional under the Fourteenth Amendment, saying (319 N.E.2d at 435, 436):

> . . . [w]hen viewed in the "historical context" of the Springfield situation . . . it becomes easy to comprehend that any attempt under c.636 to prevent the operation of the Task Force plan would constitute a significant retreat from the progress toward desegregation that had been made under the pre-amendment plan. And the cases make clear that even where steps toward desegregation are made voluntarily rather than pursuant to constitutional mandate any subsequent state action which would cause a return of the pre-existing segregation would itself be an act of de jure segregation. This is especially true where, as in this case, there is a court decree ordering the implementation of such plans.

To like effect is this Court in Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977). To paraphrase: "Proposition 1 [has] acted to undo operative

regulations affecting the assignment of pupils . . ."

II.

PROPOSITION 1, WHICH HAS THE PURPOSE AND EFFECT OF TERMINATING EFFECTIVE SCHOOL DESEGREGATION WITHIN THE LOS ANGELES UNIFIED SCHOOL DISTRICT, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT BY RETROACTIVELY DIVESTING THE MINORITY SCHOOL CHILDREN PETITIONERS OF THEIR PREVIOUSLY ADJUDICATED VESTED RIGHT TO A DESEGREGATED EDUCATION

Because Proposition 1 destroys the only class of remedies which can effectively desegregate the Los Angeles public schools, it renders the petitioners' 1970 judgment, affirmed by the California Supreme Court in 1976, an empty promise.[14/]

14/ Petitioners do not claim "a vested rght to require other pupils to be assigned to public schools on the basis of race." See Court of Appeal Opinion, Appendix at 66A. They do claim a vested right to their final judgment and to all remedies necessary to effectuate that judgment.

(Footnote 14 continued on next page)

Proposition 1 improperly attempts to carve out an exception to the constitutional principle of finality of judgments, an exception applicable only to minority students seeking a desegregated education. Under this banner, the Los Angeles Board of Education seeks to retroactively deprive the Board's minority children of vested rights secured by their final judgment more than a decade ago.

Proposition 1 provides that "any interested person," at any time, as a matter of constitutional right may compel

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14/ (CONT'D.)
The Legislative Counsel of the State, in two opinions provided on January 9 and March 21, 1979, to State Sens. Paul Carpenter and Alan Robbins, respectively, warned that Proposition 1 "could not by its operation extinguish any existing rights to the extent that such a result would amount to de jure segregation, as . . . where it would require 'resegregation' in the face of a currently active plan of desegregation." See Comment, supra, 10 Golden Gate U.L.Rev. at 677-78 & n. 336. That, of course, is precisely the situation in Los Angeles.

a court, upon application, to reopen final judgments, retry issues once decided, and modify those decisions by applying current law "to the facts which exist at the time of such modification." It is a prescription for endless litigation, inviting ambiguously identified "interested person(s)," perhaps anyone (see California's broad taxpayer statute, CCP §526a; Comment, 10 Golden Gate U.L.Rev. at 629) with a right to upset judgments "whenever rendered," as indeed the court below has done in this very case. There is nothing in Proposition 1 to prevent multiple applications by "interested persons," ad infinitum, year after year, or with any and every change in the federal law, or whenever the spirit of segregation moves them. Upon each application, minority children will be forced to re-establish their right

to relief upon new facts and new law existing "at the time of such modification."

It has long been the law that "it is not within the power of the legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." McCullough v. Commonwealth of Va., 172 U.S. 102, 123-134, 19 S.Ct. 134, 43 L.Ed. 383 (1898).15/

15/ See, 49 C.J.S. Judgments, §2, pg. 27, referring to a judgment as a vested right. For a general survey of Supreme Court cases dealing with retroactive legislation see Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev. 692 (1960) — "the traditional principle invoked in determining the constitutionality of retroactive legislation is that a statute may not abrogate 'vested rights.'" Id. at 696.

In attempting to divest plaintiffs of their vested rights secured by their judgment, Proposition 1 undermines far more than just a particular equitable remedy -- it derogates the substantive right itself which petitioners have won in their prior judgment. See Goldberg, The Administration's Anti-Busing Proposals: Politics Makes Bad Law, 67 Nw.U.L. Rev. 319, 377 (1972), observing, "Segregation injury is so intolerable that the right to non-segregated schools is the right to them now. Thus the remedy merges into the right. Any suspension of the remedy is a suspension of the right itself."

Proposition 1, of course, not merely suspends but forever denies the remedies necessary to effect desegregation to a trial court seeking to rectify school segregation regardless of cause pursuant

to the California Constitutional requirement. Jackson v. Pasadena City Board of Education, 59 Cal.2d 876 [1963]. If no Fourteenth Amendment violation is shown, student reassignment and transportation may be used only if a school board decides on its own to adopt those techinques. This illusory deference to the petitioners' state constitutional rights should be seen in its true colors--giving the key to desegregation to the Board, which has time and again refused to desegregate the Los Angeles schools in the 18 years since Jackson, see Crawford, 17 Cal.3d at 287, 288, 307, is tantamount to locking the door and throwing the key away.

The Court of Appeal wrongly insisted that Proposition 1 removes merely one among an "arsenal of remedies" which remain available to the trial court "to

alleviate unintended, nonpurposeful segregation" Appendix at 56A. But there are no other effective techniques which will desegregate minority segregated schools in Los Angeles.[16/] The California Supreme Court, referring to desegregation methods in Crawford, 17 Cal.3d at 305, specified the following:

> the redrawing of neighborhood attendance zones, the "pairing" or "clustering" of schools, the establishment of "magnet schools," and the implementation of "satellite zoning."

Every one of these techniques requires the use of "pupil school assignment or pupil transportation,' which is forbidden to the trial court by Proposition 1.

The Court of Appeal erroneously reasoned that because a student could not "claim a federal constitutional

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16/ See footnote 4, supra, page 13 .

right to attend a magnet school and a federal constitutional right to require a school district to operate one," Appendix at 68A, there is similarly no constitutional right to the mere "remedy" of "pupil school assignment or pupil transportation." Both the premise and the analogy are mistaken. If magnet schools were a remedy necessary to effectuate the constitutional right to desegregation of minority schools, which they do not now appear to be, their withdrawal from the trial court's power to order would violate the Fourteenth Amendment just as Proposition 1 does.

Petitioners do not argue that they have a constitutional right to any particular remedies. They do contend that they are entitled to effective remedies under the circumstances. This Court has often so held. E.g., North Carolina

Board of Education v. Swann, 402 U.S. 43 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). See also Wright v. Council of City of Emporia, 407 U.S. 451 (1972), holding that under the circumstances present in that case, the plaintiffs had a constitutional right to forbid the state, county, and city to carve a new city school district out of the existing county district. Of course, no such constitutional right would have existed except for the crucial fact that creation of the new school district would have seriously impeded the constitutionally required dismantling of the county's dual school system. Cf. Keyes . School District No. 1, 413 U.S. 189, 213-14 (1973).

By like token Proposition 1 purports to take away petitioners' rights

to desegregation.

Decisions which have seemingly allowed retroactive application of legislation which removed a prior remedy have almost universally involved cases in which the judgment was not final, and have generally followed the reasoning that "what Congress giveth, Congress can taketh away." E.g., Mirabal v. General Motors Acceptance Corporation, 537 F.2d 871, 876 (7th Cir. 1976).

However, where the judgment is final, the courts have not allowed a remedy to be removed retroactively. See, e.g., Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974). See also, Hodges v. Snyder, 261 U.S. 600, 603 (1923); Greene v. United States, 376 U.S. 149 (1964). "Where a statute operates immediately to cut off an existing remedy and by

retroactive application, deprives a person of a vested right, it is ordinarily invalid because it conflicts with the due process clauses of the federal and state constitutions." California Employment Stabilization Commission v. Payne, 31 Cal.2d 210, 215, 187 P.2d 702 (1947). Further,

> Notwithstanding a statute, by its terms purports to deal with a matter of remedy only, it is void and inapplicable if its operation will result in divesting or impairing vested rights. 16 C.J.S. Constitutional Law, §256, p. 1251.

Citing, inter alia, Duke Power Co. v. South Carolina Tax Commission, 81 F.2d 517 (4th Cir. 1936) cert.denied 298 U.S. 669 (1936).

In taking away from plaintiffs their effective opportunity for a desegrated education at least without litigating all over again, Proposition 1

has in effect taken away from the minority youngsters in Los Angeles who are required to attend minority segregated schools, their 1970 and 1976 judgments.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARY ELLEN CRAWFORD, etc., et al., Plaintiffs and Respondents, v. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Defendant and Appellant.	2 CIVIL NO. 60000 (Super. Ct. No. C822854)
BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MARY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association, Intervenors.	COURT OF APPEAL-SECOND DIST. F I L E D DEC 19 1980 CLAY ROBBINS, JR. Clerk Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Hon. Paul W. Egly, Judge. Vacated and remanded.

APPENDIX A

McCutchen, Black, Verleger & Shea, G. William Shea, Peter W. James, David T. Peterson, Michael M. Johnson, and Jerry F. Halverson, Attorneys at Law, for Appellant.

Fred Okrand, Mark D. Rosenbaum, Mary Ellen Gale, Antonio Rodriguez, Halvor T. Miller, Manning & Reynolds, Shockley, Duff & Hart-Nibbrig, Attorneys at Law, and Paul Hoffman, Of Counsel, for Respondents.

Cliff Fridkis, Esq., for Intervenor Bustop.

THE COURT:*

The issues are whether the amendment to article I, section 7(a), of the California Constitution, adopted November 6, 1979, on pupil school assignment and pupil transportation (Proposition 1) violates the United States Constitution, and, if it does not, whether the remedial order entered by the superior court on July 7, 1980, in the Los Angeles School District desegregation cause entitled Crawford

v. Board of Education contravenes article I, section 7(a) of the California Constitution.

The school board (Board) of the Los Angeles Unified School District (District) has appealed to this court from orders of the Los Angeles Superior Court entered May 19, 1980, and July 7, 1980. The May 19 order declined to rule on the constitutionality of Proposition 1, and held that in any event the amendment had no application to this cause. The July 7 order was one of a series of remedial orders entered pursuant to a judgment granting a writ of mandate, a judgment originally issued in 1970 by the Los Angeles Superior Court. In 1976 the California Supreme Court modified and affirmed the judgment granting the writ (Crawford v. Board of Education, 17 Cal.3d 280), and remanded the cause to the trial court to

require the Board to prepare a "reasonably feasible plan" to alleviate the harmful consequences of racial segregation in the schools within the District. On remand, the Board in response to the writ submitted to the superior court a plan which focused on pairing and clustering of selected schools, creation of magnet schools, and a plan of voluntary 'busing' for students with parental consent. The major thrust of the Board's plan was to encourage voluntary desegregation.

The trial judge (not the judge who originally tried the cause) made it clear early in the proceedings that nothingshort of a plan involving large-scale mandatory reassignment of pupils on a racial and ethnic basis would be satisfactory. At the commencement of the school year in the fall of 1978 he brought about the implementation of such

a plan. After a year's experience with the plan all parties were dissatisfied with the plan, and were agreed that it had failed to achieve its objective.

On November 6, 1979, the voters of the state approved Proposition 1, an initiative measure which amended article I, section 7(a), of the California Constitution.[1/] The effect of the

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1/ ARTICLE I. DECLARATION OF RIGHTS

§7. Due process and equal protection; pupil school assignment and transportation

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official

(Footnote continued on next page)

1/ (Cont'd)

any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

. . . . .
. . . . .

(Amended Nov. 6, 1979.)

amendment was to prohibit state courts, in desegregation cases, from ordering school boards to mandatorily reassign and transport pupils on the basis of

race, except to remedy a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution under circumstances which would authorize a federal court under federal decisional law to issue such an order. The amendment further provided that any previously issued court order which contained a mandatory reassignment provision could be modified by proper application to a court having jurisdiction over the matter, unless modification was precluded by the United States Constitution.

The Board applied to the superior court to modify the plan then if effect by eliminating all mandatory reassignment and "busing" of pupils. On May 19, 1980, the court denied the application on the ground that the original trial court had found the Board guilty of de jure segregation in violation of the

Fourteenth Amendment to the United States Constitution. On July 7, 1980, the superior court issued a new order, which, though somewhat different from its 1978 order, required substantial mandatory reassignment and transportation of pupils in the District. We have expedited the appeals from these two orders in accordance with the recommendation of the California Supreme Court.

We consider first the appeal from the May 19 order, for the reason that if the newly enacted amendment to article I, section 7(a) of the California Constitution precluded the trial court from ordering mandatory reassignment of pupils, the appeal on the merits of the July 7, order would become moot. Plaintiffs contend that the original findings of the trial court in this

cause found the Board guilty of de jure segregation in violation of the Fourteenth Amendment to the United States Constitution, thereby making inapplicable to this cause the limitation imposed by the amendment to the California Constitution, and that in any event the amendment to the California Constitution brought about by Proposition 1 is itself unconstitutional and violative of the United States Constitution.

I.

Both California and federal law pertaining to segregation in the public schools have a common origin in the United States Supreme Court decision of Brown v. Board of Education (1954) 347 U.S. 483. But thereafter California and federal law followed parallel but somewhat different courses. As we will develop, infra, the clear impact of

Proposition 1 is to bring one aspect of California law into conformity with federal law.

The United States Supreme Court decisions, starting with Brown v. Board of Education, supra, have examined the problem of segregation in the public schools of the various states in the light of the equal protection clause of the United States Constitution. The essential holding of Brown was that state constitutional and statutory provisions requiring segregation of white and black children in public schools on the basis of race deny black children the equal protection of the law guaranteed by the Fourteenth Amendment and are therefore void. In rejecting the long-standing separate-but-equal rule of Plessy v. Ferguson (1896) 163 U.S. 537, the court in Brown

held that separate educational facilities are inherently unequal for the reason that the mere fact of legalized segregation generates a feeling of inferiority in the black students. (p. 494.) In essence, psychological trauma was at the heart of the Brown decision. Thurgood Marshall, the then counsel of the National Association for the Advancement of Colored People, in arguing before the Supreme Court in Brown urged only "that the state-imposed racial segregation be taken off . . . . If school officials were enjoined from enforcing segregation, then I think whatever district lines . . . are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint." (Argument: The Oral Argument Before the Supreme Court in

Brown v. Board of Education of Topeka, 1951-1955, pp. 47-49 (L. Friedman ed. 1969).)

The objective of the Brown decision, and of the cases later implementing it, was to dismantle officially-imposed dual school systems. Once a dual system has been dismantled and a unitary system established, a school board is under no affirmative federal duty to adjust attendance to comport with shifting and changing neighborhood racial patterns, so long as the changes are attributable to private conduct. (Pasadena City Board of Education v. Spangler (1976) 427 U.S. 424.) The scope of federal constitutional law in this field was clarified over the ensuing years in a series of decisions rendered by the United State Supreme Court at a time subsequent to the

findings and conclusions of the original trial judge herein in 1970.

Clarification began with Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S. 1, a southern school desegregation case concerning remedies available to a federal court to desegregate a legally segregated school system. Two of its points are relevant here. No particular degree of racial balance or mix is required to desegregate a school. (p. 24.) Absent a constitutional violation a federal court has no authority to assign students to schools on the basis of race. (p. 28.)

The next development came in Keyes v. School District No. 1 (1973) 413 U.S. 189, a case of deliberate, intentional racial segregation in a western city. The court declared that to establish unlawful segregation in violation of the

Fourteenth Amendment "plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action . . . [consisting of] an unconstitutional policy of deliberate racial segregation . . ." (p. 198.) De jure segregation, said the court, comprehends purpose or intent to segregate. (p. 208; italics in original.)

Thereafter followed the decision in Washington v. Davis (1976) 426 U.S. 229, a case involving claimed racial discrimination in police officer tests. In discussing the Fourteenth Amendment's prohibition against official discrimination on the basis of race, the court declared that the discrimination must be purposeful. In respect to school desegregation it said:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action.' Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). 'The differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.'" (p. 240; italics in original.)

Next came Pasadena City Board of Education v. Spangler (1976) 427 U.S. 424, a case involving termination of an existing desegregation plan. The original plan had established a racially neutral school system, said the court, and from that point on the power of the

district court to order assignment of pupils to schools on the basis of race came to an end, even though subsequent population shifts had brought about a degree of resegregation. Absent a constitutional violation there is no basis for judicial assignment of pupils on a racial basis. (p. 434.)

In Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, where racially discriminatory zoning was charged, the court again noted that proof of racially discriminatory intent or purpose was required to show a violation of the equal protection clause of the Fourteenth Amendment. (p. 265.)

Thereafter, in Dayton Board of Education v. Brinkman (1977) 433 U.S. 406 (Dayton I), a school desegregation case, the court once more noted that racial isolation by itself "is not a

violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions." (p. 413.) District courts may exercise power over school districts only on the basis of a constitutional violation which results from action by a school board which is intended to, and does in fact, discriminate against minorities. (p. 420.) The same theme appears in Milliken v. Bradley (1977) 433 U.S. 267 (Milliken II), another northern school desegregation case, where the court noted that "the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more [citations]. An order contemplating the 'substantive constitutional right [to a] particular degree of racial balance or mixing' is therefore infirm

as a matter of law." (p. 280.)

Most recently, in Columbus Board of Education v. Penick (1979) 443 U.S. 449, the court again observed that the conduct prohibited to school boards is intentional segregation. Plaintiffs must prove that school officials intended to segregate, said the court. "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." (p. 464.) And in the companion case of Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II), at page 536, footnote 9, the court said: "We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination . . . ." (Italics ours.)

The foregoing decisions of the United States Supreme Court clearly identify constitutional violations of the Fourteenth Amendment as instances which involve intentional segregative state action taken with discriminatory purpose. In more familiar terms we can describe this intent as specific intent to discriminate. Only such a violation authorizes a federal court to give orders to a local school board on the conduct of school business. A correlative of this rule is that racial isolation which has resulted from causes other than intentional discrimination does not constitute a violation of the Fourteenth Amendment. In sum, the federal Constitution does not require integration, it only prohibits state-compelled segregation. (Swann v. Charlotte-Mecklenburg Board of Education

(1971) supra, 402 U.S. 1.) This subsequently-developed frame of reference for addressing claims of the denial of equal protection of the laws by reason of racial imbalance in public school is a natural extension of the rationale of Brown v. Board of Education, supra, in that it is intentional or purposeful segregation which produces feelings of inferiority in minority students and the consequent damaging psychological effects.

With the scope of federal law in mind, we analyze the situation as it existed in the District in 1970 at the time the trial court entered its original findings of fact and conclusions of law, a time prior to the clarification we have just discussed of the scope of the Fourteenth Amendment in school desegregation cases. The

trial court's findings and conclusions in substance asserted and deduced the following:

The Los Angeles Board of Education operates some 562 schools with 650,000 students in grades from kindergarten through twelfth grade in an area of 711 square miles.

In 1968 the racial and ethnic composition of the students was

53.6 percent white,

22.6 percent Negro,

20 percent Hispanic, and

3.8 percent Oriental and other.[2/]

2/ In October 1980 the composition of the student population was

White	23.7 percent
Black	23.3 percent
Hispanic	45.3 percent
Oriental & other	7.7 percent.

The number of white pupils in grades K-3 had fallen to 16.1 percent.

In 1966 the bulk of the District's schools were either majority white, majority Hispanic, or majority Negro. In 1966, 1967, and 1968 fourteen new schools were opened, each of which contained a student population which was either majority white or majority Negro. The Board "knew, or in the exercise of reasonable care should have known, at the time of the selection and purchase of the sites . . . [that these] schools and each of them would upon its opening be racially imbalanced and either Negro segregated or minority segregated or white segregated."

From 1966 to 1968 the number of minority segregated schools in the district increased. In 1968 the bulk of minority pupils attended schools having well above 50 percent combined minority enrollment, and the bulk of white

pupils attended schools having well above 50 percent white enrollment.

In 1970, the trial court found that substantial segregation existed in the District in that a number of schools met the trial court's definition of a segregated school -- a school with "substantially more than 49 percent of minorities, or any one thereof, or substantially more than 50 percentwhites." At that point the racial and ethnic composition of the students in the District was 53.6 percent white, and 46.4 combined minorities.

The Board caused this factual segregation, the court deduced:

> By mandating neighborhood schools;
>
> By site selection;
>
> By mandating school attendance areas and boundaries;
>
> By adopting transfer and

transportation policies ineffective for integration.

Subsequent to 1963, said the court, none of the school sites or school attendance boundaries selected by the Board was designed to effectuate desegregation or integration.

The court also found, without any specifics, that plant, teachers, physical facilities, and curriculum at the Board's minority schools were in fact of poorer quality than plant, teachers, physical facilities, and curriculum at its predominantly white schools, that minority schools were more crowded than white schools.

The court then concluded that the Board had segregated, de jure, its students through the following policies, practices, and omissions:

Adoption of policies of site selection and neighborhood schools without regard to desegregation or integration.

Establishment of attendance areas and boundaries without regard to its duty to create racially balanced schools and to eliminate segregation. Board practices included assignment of pupils by geographic area and adoption of feeder policies without regard to existing racial imbalance.

Establishment of transfer and transportation policies of which socio-economic disadvantaged students could not take advantage and which failed to provide free transporation for pupils

given permits to transfer. As a consequence the socio-economic disadvantged student was forced to attend a segregated neighborhood school. Open enrollment, said the court, was not a policy to correct racial imbalance but merely a tool of which disadvantaged pupils could not avail themselves.

Restriction to surplus funds of expenditures to create racial balance and provide compensatory educational programs for minorities.

The court asserted that in terms of educational discrimination there is no difference between de jure and de facto segregated schools. It is not true, said the court, "that the Federal Constitution only requires integrated education . . . if the segregation . . . is of a de jure nature." (Finding V.6.) It is virtually impossible, said the

court, for neighborhood schools which are in fact segregated to have only de facto segregation. (Conclusion VII.)

There was no finding by the trial court that the Board ever had a policy or program which denied admission to any school or required attendance at any school on the basis of race. Nor was there any finding that the Board ever gerrymandered attendance zones to create or preserve segregated schools.

Patently, the trial court in 1970 took the view that the federal Constitution required elimination of school segregation, regardless of its cause and irrespective of the existence of state action intended with discriminatory purpose to bring about segregation. On this basic premise the trial court deduced the existence of de jure segregation from such neutral acts as

maintenance of a neighborhood school system, siting of schools in the geographic center of their need, assignment of pupils to neighborhood schools, and failure to provide free transportation for open transfers. Having found a federal constitutional violation, the trial court then declared that a pupil has no right to choose which public school he will attend (V.19(v)), and that the Board has an affirmative duty to provide equal educational opportunity by compelling its pupils to attend schools on the basis of their race or color. (V.19(iii).)

As noted earlier, the trial court made these deductions and inferences in 1970 at a time it did not have the benefit of the more recent decisions of the United States Supreme Court.

In the intervening period that court has made it clear that the federal Constitution only authorizes court assignment and transportation of pupils on the basis of race when there has been state action which intentionally segregated with discriminatory purpose. If no such state action has occurred, elimination or alleviation of racial segregation which has resulted from economic causes and from neighborhood residential patterns is a matter left to local school authorities. In the early development of the law implementing Brown v. Board of Education, supra (1954) 347 U.S. 483, the phrases de jure and de facto were used as a kind of shorthand to distinguish between segregation mandated by statute and segregation which had resulted from the operation of

demographic, economic, and other voluntary factors. The concept of unlawful segregation, however, rapidly outgrew segregation by statute and came to encompass all state activity designed to bring about racial segregation, whether facially neutral or not. (Cf. Yick Wo v. Hopkins (1886) 118 U.S. 356.) Unlawful segregation in violation of the Fourteenth Amendment was not limited to segregation by statute, regulation, or ordinance, but extended to acts and practices of a school board consciously adopted with discriminatory purpose to create or perpetrate school segregation. Such acts as establishment of attendance zones, use of mobile classroom units, and use of optional zones, when done with discriminatory purpose and segregative intent, can amount to unlawful

segregation. "We emphasize," said the United States Surpeme Court, "that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate." (Keyes v. School District No. 1 (1973) supra, 413 U.S. 189, at p. 208; italics in original. As a result of this and subsequent cases de jure segregation was more accurately identified as purposeful segregation, it was uncoupled from state statutory law, and it was recoupled to state practices. Unconstitutional segregation became precisely defined as intentional, purposeful segregation, one which contained invidious discriminatory purpose. (Arlington Heights v. Metro. Housing Corp. (1977) supra, 429 U.S. 252, 265, 266.) In recent school

desegregation cases the labels de facto and de jure have fallen into desuetude and no longer appear to be in general use in United States Supreme Court opinions. (Columbus Board of Education v. Penick (1979) 443 U.S. 449; Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II).) With the advent of the recent, more precise identification of unconstitutional segregation, the terms de jure and de facto segregation appear to have outlived their usefulness, and a federal constitutional violation of the Fourteenth Amendment in a school desegregation cause is now accurately identified as state action taken with specific segregative intent and discriminatory purpose.

When the 1970 findings of the trial court are reviewed in the light of the

correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to de jure segregation in violation of the Fourteenth Amendment.

The essence of the trial court's findings is synthesized in the following paragraph:

> "Board had, and knew that it had, the power and the duty specially imposed by law upon it, though denied by it: To adopt school assignment policies that would incorporate other than geographical criteria, i.e., policies that would rectify the existing racial imbalances and that would create or tend to create racial balance and integration; to select school sites for that aim, purpose and end; to readjust attendance

> zones and areas and to select school sites to meet and overcome the effect of population movement. It knew, or should have reasonably know, of the population movements within its District. Board did not execute or perform these or any of those powers or perform those or any of those duties specially imposed by law upon it." (Italics ours; Finding IV.36.)

But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements. "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." (Washington v. Davis (1976) 426 U.S. 229, at p. 250.) And, as the court said in Dayton Board of Education v. Brinkman (1977) 433 U.S. 406, 413, (Dayton I), "The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself,

is not a violation of the Fourteenth Amendment . . ." When the trial court at bench concluded in 1970 that such a duty was required by federal law, the trial court clearly erred as a matter of law. Since the trial court's characterization of the Board's action as de jure segregation was a conclusion of law rather than a finding of fact, we are not bound by it. (Morrison v. State Board of Education (1969) 1 Cal.3d 214, 238; Hinman v. Westinghouse Elec. Co. (1970) 2 Cal.3d 956, 963.)

In sum, no federal violation of law was established by the 1970 findings, and the trial court's identification of the then existing racial segregation within the Los Angelesschool system as de jure segregation was true only in a Pickwickian sense, and was not true at all in the sense of federal law.

Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation -- regardless of the terminology used by the court.

One further element which bears tangentially on the question of intentional segregation with discriminatory purpose is the trial court's finding that the plant, teachers, physical facilities, and curriculum of minority schools were of poorer quality than those of predominantly white schools and that overcrowding in minority schools was greater than in white schools. This finding, however, did not assert that the lower quality of minority schools resulted from intentional segregation with discriminatory purpose but merely concluded that the Board knew or should

have known of the differential in quality between the two sets of schools. Absent some specific intent on the part of the Board to maintain inferior minority schools in order to perpetrate racial segregation, its delinquency in this respect raises separate issues which are curable by separate remedies. If older shcools in central districts are run-down and overcrowded and have not received the extra maintenance owed to them by reason of their age, and if senior teachers prefer to teach in suburban schools rather than in central schools, the Board must take positive action to equalize school facilities and equalize the quality of teaching throughout its several schools. Such has been the law in California for many years, most conspicuously set out in Serrano v. Priest (1971) 5 Cal.3d 584.

The court there observed that in instances of unequal expenditures for schools the discrimination is one based on wealth and not on race. (p. 604.) So here, the problem of unequal facilities is not directly connected with the problem of racial segregation. The problem of differential quality among schools is not solved by assignment of pupils to particular schools on the basis of race, but is solved by allocation of extra money and assignment of senior teachers to the poorer schools. The two problems frequently parallel one another but they are distinct and different problems. Only the problem of racial and ethnic segregation is directly involved in the cause at bench.

When on appeal this cause reached the California Supreme Court, Crawford

v. Board of Education (1976) 17 Cal.3d 280, that court squarely based its substantial affirmance of the trial court on the state constitutional ground of equal protection of the laws, determining that under state law the Board had a constitutional duty to alleviate segregation in the schools regardless of cause. The existence of segregated schools in the District, coupled with the Board's failure to take reasonably feasible steps to desegregate its schools, said the court, constituted a sufficient basis to sustain the trial court's order.

The Calfiornia Supreme Court noted and agreed with the trial court's characterization of the segregation as de jure in nature, but it also noted that whether school districts have an obligation under the federal

Constitution to eliminate segregation regardless of cause was an open question and, therefore, it rested its decision on state constitutional grounds. The court then declared that because segregation existed in the schools of the District and the Board had failed to undertake reasonably feasible steps to desegregate its schools, under the California Constitution the Board must be required to take "reasonably feasible steps to alleviate segregation." The trial court could compel the Board to prepare and implement a plan to alleviate segregation and the harmful effects of segregation in the District's schools. The past decade, said the court has produced literally scores of alternative administrative techniques which may be used to facilitate school desegregation.

The court was mindful of the many problems faced by a school district as large and geographically widespread as the District in attempting to desegregate hundreds of schools at various grade levels. Consequently, the court repeatedly emphasized that the Board's obligation was to take "reasonable and feasible steps" to alleviate segregation where it existed. The Board ws not, and is not, said the court, obliged to achieve absolute racial balance in all schools according to the demographics of the entire District. The court eschewed any attempt to define a "desegregated" school in terms of specific percentages, and in that respect it modified the original judgment of the trial court, which had declared that any school with substantially more than 49 percent minorities or subtantially more than

50 percent white was a segregated school. The court also said: "[I]n a school district in which 'minority' students significantly outnumber 'majority' students, a school whose racial composition might in some other district make it a 'segregated school' may not warrant that legal characterization." (Crawford, p. 304, fn. 16.)

That, of course, is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades K-3. Yet for the purpose of applying the legal principles related to school segregation, whites are still designated as the "majority," and segregation is viewed in terms of the minorities, or any one of them, being

isolated from whites.[3/]

In anticipation of the provisions of a specific remedial desegregation plan the California Supreme Court first pointed out that no set racial or ethnic percentages were required as a matter of constitutional law or could be established for a particular school in terms of the District's student population. Per-

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3/ That approach appears to be a hangover from the historic situation in some areas in the country which produced the background against which the decision in Brown v. Board of Education, supra, was rendered.

The wisdom of, or the need to, perpetuate that approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic "minority" children, even when they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students.

centages of various racial or ethnic groups could vary, even significantly, in different schools. The court referred to the scores of administrative techniques for facilitating the desegregation of school systems, including rezoning, (integrative gerrymandering) pairing, clustering, magnet schools, teacher patterns, opening new schools, closing old ones, and free transportation for optional transfer. "Busing," declared the court, is not a constitutional end in itself, but simply one potential tool which may be utilized to satisfy a school district's constitutional obligation. In some circumstances it will provide an appropriate and useful element in a desegregation plan; in others its costs in financial and educational terms will render its use inadvisable. Continuing,

the court opined ". . . so long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress [4/] . . . we do not believe the judiciary should intervene in the . . . process . . . reliance on the judgment of local school boards in choosing between alternative desegregation strategies holds society's best hope for the formulation and implementation of desegregation plans which will actually achieve the ultimate constitutional objective of providing minority students with

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4/ We interpret that phrase to mean meaningful progress in light of present conditions. A genuine opportunity to show such progress under a plan of its own has not yet been afforded the Board.

the equal opportunities potentially available from an integrated education." (Crawford, supra, at pp. 305-306.)

From the foregoing recital of the cause and of the United States Supreme Court desegregation decisions we conclude that the racial imbalance and segregation which existed in many schools in the District and the Board's actions in relation thereto did not constitute a violation of the equal protection clause of the Fourteenth Amendment as interpreted by the United States Supreme Court, in that racial imbalance and segregation did not result from Board acts performed with segregative intent and discriminatory purpose. It follows that federal courts would not be authorized under federal decisional law to require pupil school assignment or transportation by race

to remedy the imbalance. Thus article 1, section 7(a), of the California Constitution, as it now reads, operates to prohibit the trial court from ordering assignment and transportation of pupils on the basis or race unless this section of the California Constitution itself violates the Fourteenth Amendment to the United States Constitution.

II.

The remaining question is the federal constitutionality of a state constitutional amendment conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment.

California law on the subject of school desegregation has evolved from the opinion of the California Supreme Court in Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876. That case involved a demurrer to a complaint which alleged that the Pasadena City School District had gerrymandered its school attendance boundaries to perpetuate racial segregation in certain schools. The court, relying on Brown v. Board of Education, supra (1954) 347 U.S. 483, reasserted the proposition that inten

tional segregation by race in the public schools denies minority students the equal protection of the laws. The issue in Jackson was the use by the Pasadena school board of school boundaries designed to perpetuate racial segregation, an allegation which, if true, amounted to intentional segregation with discriminatory purpose in violation of the Fourteenth Amendment. The court, observing that racial imbalance in California schools is usually caused by economic factors and housing patterns rather than by intentional segregation imposed by school authorities, concluded that even in the absence of officially caused or officially perpetuated segregation, a school board has a duty to affirmatively address the problem of racial imbalance. The court, however, was careful to point out that in performing that duty ". . .

consideration must be given to the various factors in each case, including the practical necessities of governmental operation . . . the degree of racial imbalance in the particular school . . . the difficulty and effectiveness of revising school boundaries . . . and the availability of other facilities to which students can be transferred." (Jackson v. Pasadena City School Dist., supra, at p. 882.)

Jackson was followed by San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, which interpreted Jackson, supra, as imposing on California school boards an affirmative duty to attempt to alleviate racial imbalance or racial isolation.

When the cause at bench, Crawford v. Board of Education (1976) 17 Cal.3d 280, came before the California Supreme

Court, state law on this subject was formally severed from federal law, and school boards were placed under an affirmative duty to undertake reasonably feasible steps to alleviate racial segregation in public schools regardless of the cause of the segregation. The existence of the duty was derived both from state decisional law (Jackson, supra, and Johnson, supra) and from the equal protection clause in article I, section 7(a), of the California Constitution. (Crawford, pp. 297, 302.) The cause was then remanded to the trial court with instructions to supervise the preparation and implementation of a reasonably feasible desegregation plan. The trial court was ordered to proceed on the basis of state law, and to utilize such of the "literally scores" (pp. 286, 305) of desegregation techniques as might

provide reasonably feasible means for desegregation. The California Supreme Court identified "busing" as merely one of the potential tools that might be utilized.

Subsequent to remand but before the trial court made its definitive order of July 7, 1980, article I, section 7(a), of the California Constitution was amended to remove "busing" (pupil school assignment and pupil transportation) from the arsenal of techniques available to a state court to alleviate racial school segregation caused by economic, geographic, and demographic factors and not by intentional segregation with discriminatory purpose. The posture of the cause and the position of those connected with it then became as follows:

The Board remains subject to its constitutional duty under state law to

undertake reasonably feasible steps to alleviate school segregation regardless of cause.

In carrying out its duty the Board may utilize any or all desegregation techniqeus, including pupil assignment and pupil transportation.

The Board is not subject to any federal obligation for violation of the Fourteenth Amendment.

The trial court is under a duty to supervise the preparation and implementation of a reasonably feasible desegregation plan. In the absence of a Board plan that provides meaningful progress, the trial court is authorized to implement a desegregation plan that may utilize all available desegregation techniques except that of pupil school as signment and pupil transportation.

Thus the effect of the constitu-

tional amendment is to withdraw one desegregative technique from the state court's arsenal of remedies available to alleviate unintended, non-purposeful segregation, but to leave all other available techniques intact.

An amendment which produces such a posture, plaintiffs assert, itself amounts to a violation of the equal protection clause of the federal Constitution, and Proposition 1 is either unconstitutional in its entirety or unconstitutional as applied to this cause. To support their assertion that Proposition 1 is contrary to the Fourteenth Amendment plaintiffs advance three arguments: (1) Proposition 1 removes a previously given state right, (2) it reflects intent to segregate with discriminatory purpose, and (3) it retroactively divests plaintiffs of adjudicated rights.[5/]

5/ SEE NEXT PAGE.

1. Removal of a previously given

5/ Plaintiffs also argue that Proposition 1 was improperly enacted, because the voters were not notified that it effectively amended sections of the California Constitution other than article I, section 7(a), because its title was misleading, and because it violated the single subject requirement. Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization (1978) 22 Cal.3d 208, disposes of each of these arguments. That cause dealt with Proposition 13, an initiative which "change[d] the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing powers of state and local governments." (p. 218.) The court rejected comparable challenges to Proposition 13 and held "that an initiative measure will not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other." (p. 230.) The court noted Proposition 13 consisted of four major elements which it found "reasonably germane to, and functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief." (p. 230.) The elements of Proposition 1 are likewise reasonably germane to, and functionally related to, the common underlying purpose of elimination of court-ordered pupil reassignment or transportation unless required to remedy a Fourteenth Amendment violation or unless voluntarily undertaken. (See also, Fair Political Practices Comm. v. Superior Court (1979) 25 Cal.3d 33, cert.denied, 444 U.S. 1049 (1980).)

state right. On this point the keystone in plaintiffs' argument is Reitman v. Mulkey (1967) 387 U.S. 369. That cause involved a California initiative constitutional measure which repealed acts of the legislature which had prohibited private discrimination in residential housing. But more was involved than removal of a previous state right given to tenants not to be the subject of private discrimination. The United States Supreme Court interpreted the new constitutional provision as not merely repealing existing law prohibiting private discrimination, but as state action authorizing private racial discrimination in the housing market as basic policy, which in itself amounted to a violation of the Fourteenth Amendment. Under such circumstances the California constitutional initiative could not

survive the Fourteenth Amendment. Proposition 1 does not, of course, create a right to discriminate and does not change any substantive law of rights; it merely removes court-ordered pupil school assignment and transportation as a remedy available to cure state-proscribed racial imbalance in public schools.

Plaintiffs also rely on Hunter v. Erickson (1969) 393 U.S. 385, as authority or the invalidity of Proposition 1. There, an Akron, Ohio, charter amendment required that city ordinances dealing with discrimination on the basis of race, color, religion, national origin, or ancestry in the area of housing must be approved by a majority of voters at a general or regular election. Other ordinances, including ordinances dealing with other forms of discrimnation, would become effective thirty days after pas

sage by the city counsel. [sic] The United States Supreme Court noted that the Akron charter amendment "was an explicitly racial classification treating racial housing matters differently from other racial and housing matters." (p. 389.) This discrimination on the basis of race, religion, or ancestry violated the Fourteenth Amendment "because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . ." (p. 391.)

At bench, however, and unlike the Akron charter amendment, Proposition 1 embraces the protection of the Fourteenth Amendment and does not seek to violate it.

If a state is not under a federal duty to adopt a particular act in the first place (such as rectification of

racial imbalance in its schools which has resulted from population shifts, cf. Pasadena Board of Education v. Spangler (1976) 427 U.S. 424) recission of the act cannot be unconstitutional. See Dayton Board of Education v. Brinkman (1977) 433 U.S. 406, 413-414 (Dayton I), and Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II), where at page 531, footnote 5, the court said:

> "Racial imbalance, we noted in Dayton I, is not per se a constitutional violation, and recission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment.)"

The notion that California could not conform its constitutional right of equal protection of the laws to that guaranteed by the federal Constitution appeared startling to Justice Rehnquist,

who wrote in this case:

> "'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.'" (Board of Education of City of Los Angeles v. Superior Court of California (1980) 49 U.S.Law Week 3163.)

At oral argument plaintiffs' counsel candidly took the position that if, for example, California should recede from its present restrictive laws on the scope of permissible search and seizure to make them conform to the less stringent restrictions on search and seizure required under the federal Constitution, such California action would violate the Fourteenth Amendment. In effect, California's presently restrictive laws on search and

seizure could never be relaxed, either by state or federal action. On this point we note our basic disagreement with counsel, and we conclude that as a matter of federal constitutional law California can conform its constitutional protection of rights in this and other areas to those given under the United States Constitution, even though the specific protection under the California Constitution might have previously exceeded that under the federal Constitution.

In short, we do not believe a state constitutional amendment can be said to violate the Fourteenth Amendment by specifically embracing it.

2. Improper discriminatory purpose. The argument here is that Proposition 1 was passed with segregative intent and discriminatory purpose. A sufficient answer may be found in the

constitutional amendment itself, which declares the amendment is necessary to make most effective use of the limited resources available for public education, to maximize educational opportunities, to protect the health and safety of pupils, to enhance the ability of parents to participate in the educational process, and to prevent the waste of scarce fuel resources. We think it pure speculation to suppose that voters who supported Proposition 1's restrictions on mandatory school assignment by race of children outside their home areas were motivated by specific intent to effect racial segregation and by discriminatory purpose. Finally, we also believe the voters who adopted this contitutional amendment could have been motivated without segregative intent and discriminatory purpose by the considerations set out by Justice

Powell in Estes v. Metropolitan Branches, Dallas NAACP (1980) 444 U.S. 437 (dissenting from a dismissal of writs of certiorari as improvidently granted):

> "The pursuit of racial balance at any cost- the unintended legacy of Green- is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school-age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body. See Parents Assn. of Andrew Jackson High School v. Ambach, 598 F.2d 705, 717 (CA2 1979). The general quality of the schools also tends to decline when substantial elements of the community abandon

them." (Pp. 450-451)

3. Deprivation of vested rights. Plaintiffs' final argument against the application of Proposition 1 to this cause is that it wrongfully deprives minority children of their vested right to a desegregated education. We do not believe any pupil has a vested right to require other pupils to be assigned to public schools on the basis of race. The sole vested right involved, if that is the proper phrase, is the right of a pupil to receive an education which is not intentionally segregated and to attend a school where the school board has performed its duty to take all reasonable steps to alleviate segregation, regardless of cause. This right, recognized in Crawford, supra, has not been removed by Proposition 1, which does not purport to change the duty

imposed on a school board by California law to take all reasonably feasible steps to alleviate racial segregation in its schools regardless of cause. All the amendment does is remove from the courts the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation. Perhaps an illustration divorced from the emotional connotations attached to "busing" will clarify the point. Suppose a constitutional amendment had been adopted removing from the courts the authority to require use of magnet schools as a remedy for racial imbalance and racial isolation. (From time to time magnet schools are attacked as elitist institutions which drain away the brightest pupils from the regular schools, to the disadvantage of those

who are left.) A state policy against court-compelled use of magnet schools as a technique to alleviate racial imbalance contrary to state law might be ill-advised, but we do not believe a student could claim a federal consitutional right to attend a magnet school and a federal constitutional right to require a school district to operate one, even though a state court had written approvingly about the use of magnet schools as a desegregative technique in a desegregation action brought on behalf of the student. All that the constitutional amendment has done, both in the hypothetical case and in our real case, is to remove one remedy from future court enforcement of a state constitutional right. Prior to the passage of Proposition 1 no particular remedy had been ordered into effect by the California

Supreme Court, and no particular remedy had been mandated. We find the claim of vested right inapplicable.

In sum, article I, section 7(a), does not intentionally authorize or perpetuate segregation with discriminatory purpose. Nor does it remove the duty of a school board under state law to affirmatively address the problem of racial imbalance in the schools. It divests no vested rights. In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by the decisions of the United States Supreme Court, it merely provides a more precise contour to the duty established by California law and court decisions to desegregate public schools regardless of cause. (Cf. Brown v. Califano (1980) 627 F.2d 1221.) We

conclude that Proposition 1 does not violate the federal Constitution and that its application to this cause is constitutional under the Fourteenth Amendment.

The orders of May 19, 1980, and July 7, 1980, are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion. It is not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester. Our previous orders dated August 6, 1980, and September 4, 1980, staying certain features of the trial court's plan, are continued in force until further order of the

court.

CERTIFIED FOR PUBLICATION.

APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

Minutes of Division Two
January 14, 1981

Civil No. 60000

Crawford

vs.

Board of Education, etc.

The Court: Petition for rehearing denied.

APPENDIX B

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 11 1981

I have this day filed Order

HEARING DENIED

In re: 2 Civil No. 60,000

Crawford, etc., et al.

vs.

Bd. of Education of the City of Los Angeles

Respectfully,

Clerk

APPENDIX C

APPENDIX D

IN THE
Court of Appeal,
Second Appellate District
State of California

MARY ELLEN CRAWFORD, etc., et al., Plaintiffs and Respondents,	No. 60000 S.C. No. C 822854
vs.	REMITTITUR
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Defendant and Appellant.	ON APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES
BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MARY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association,	March 12, 1981

Intervenors.

The above-entitled cause having been fully argued, submitted and taken under advisement,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the orders of May 19, 1980, and July 7, 1980, are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion. It is

not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester. Our previous orders dated August 6, 1980, and September 4, 1980, staying certain features of the trial court's plan, are continued in force until further order of the court.
Appellant to recover costs.

I, CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered on December 19, 1980 , and now remaining of record in my office.

Dated: MAR 12 1981 CLAY ROBBINS, JR., Clerk

By _____
Deputy

APPENDIX E

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES DEPT. EAST

Date: May 19, 1980 Judge HERBERT H. COX

Honorable: Paul Egly Judge Pro Tem Deputy Clerk

Honorable NONE Deputy Sheriff

Deputy Clerk _____

1 _____

NONE Reporter

(Parties and counsel checked if present)

C 822 854

Mary Ellen Crawford, etc. et al.,

vs.

Board of Education of the City of Los Angeles

Counsel for Plaintiff

Fred Okrand
Lynn Pineda
Joseph Duff
Mark Rosenbaum
Michael Bodaken
Anthony Rodriguez

NATURE OF PROCEEDINGS.

Lawrence B. Trygstad
Richard Schwab and
Janis Gordon for
INTERVENOR, UTLA

Brenda P. McKinsey
and Arthur Goldberg
for INTERVENOR,
INTEGRATION PROJECT

G. William Shea
David T. Peterson
Jerry Halverson
Peter James
Michael Johnson
Counsel for Defendant

AMICUS CURIAE,
John Caughey

Cliff Fridkis for
INTERVENOR, BUSTOP

(AO)

COURT'S MINUTE ORDER

(Please refer to attached order)

Dept.
EAST L

Minutes Entered
May 19, 1980
COUNTY CLERK

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARY ELLEN CRAWFORD, etc., et al., Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent.	Case No. C 822854 MINUTE ORDER

The board's motion of November 15, 1979, joined by Bustop, for modification of the court's orders of February 7, 1978, and May 30, 1979, to eliminate the portion of such orders requiring mandatory assignment of pupils for the purpose of desegregation is denied. The finding of this court in 1970 that the respondent board participated in racial discriminatory practices which led to the segregation of the Los Angeles Unified School District was expressly affirmed by the opinion of the

California Supreme Court in Crawford v. Board of Education, 17 Cal.3d 280 at p. 285:

> "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature."

The remedy required by Crawford is not inconsistent with the remedy required by the United States Supreme Court in Dayton Board of Education v. Brinkman, ___ U.S. ___, 61 L.Ed.2d 710, 99 S.Ct. 2971 (1979) and Columbus Board of Education v. Penick, ___ U.S. ___, 61 L.Ed. 666, 9 S.Ct. 2941 (1979), in similar findings and situations. To cite the history of judicial remedial desegregation orders where de jure acts have been found to cause school segregation requires citation to a myriad of federal cases. However,

reference is made to Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 L.Ed.2d 554, 91 S.Ct. 1267 (1971), as the definitive statement of remedies available to a federal court under the Fourteenth Amendment to the United States Constitution.

The provision under the so-called Robbins Amendment of Article 1, Section 7(a), of the California Constitution requiring modification of existing judgments and orders to conform to the federal cases and United States constitutional requirements would, even if constitutional, not change the terms of the mandate previously issued herein, as that mandate and the federal obligations under federal case law are not inconsistent and require identical remedies.

Petitioners in opposition seek to have the amendment to Article 1, Section 7(a) declared unconstitutional. The mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions and the request for such declaration is moot and will be denied.

The motion by the board to strike the unofficial records and documents heretofore filed by the petitioners in opposition to modify is made moot by the above ruling.

Dated: June ___, 1981

PAUL EGLY, Judge of the Superior Court

APPENDIX F

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(Additional Attorneys listed on Page Two)

Attorneys for Petitioners

F I L E D
June 19, 1980
John J. Cocoran,
County Clerk
Herbert H. Cox,
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARY ELLEN CRAWFORD, a minor etc., et al., Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent,	No. 822 854 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MINUTE ORDER OF MAY 19, 1980

APPENDIX F

BETTER EDUCATION FOR STUDENTS)
TODAY; BUSTOP, a corporation;)
CHARLES DREEBIN, et al.;)
ROBERT M. LOVELAND and)
MARY KEIPP,)
)
Intervenors.)

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Los Angeles, CA 90008
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MANNING, REYNOLDS & ROBERTS
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By motion filed November 15, 1979, during proceedings resulting from this Court's judgment of May 12, 1970 requiring the Los Angeles Board of Education to present to this Court by July 1, 1970 a Master Plan of Integration that would within a reasonable period of time effect a nondiscriminatory unitary school

system, respondent Board of Education moved the Court "pursuant to Article I, Section 7(a) . . . of the California Constitution," "as amended" by Proposition 1 on the Novebmer 6, 1979 California ballot, to modify this Court's orders of February 7, 1978 and May 30, 1979 so as to eliminate from said orders "those portions of the desegregation plan . . . which require the mandatory reassignment of pupils for the purposes of desegregation."

Petitioners, supported by intervenors Dreebin, et al, raised the issue as to the unconstitutionality of Proposition 1. Respondents. supported by intervenor Bustop, defended the constitutionality of the Proposition. Briefs supporting the differing points of view were filed by the parties and considered by the Court.

Following the completion, on April 11, 1980, of the proceedings mentioned in the first paragraph hereof, the Court, by way of a minute order dated May 19, 1980, denied respondent's motion and also declined on the ground of mootness, to pass upon the question of the constitutionality of Proposition 1.

Thereafter, respondent Board requested that there be findings of facts and conclusions of law with regard to said minute order. Pursuant to that request, the Court makes the following:

FINDINGS OF FACT

1. In its Findings of Fact and Conclusions of Law dated May 12, 1970, this Court found that respondent Board had been guilty of operating

intentionally, de jure and in bad faith a segregated school system.

2. The Court, therefore, on May 12, 1970, ordered the Board to prepare a desegregation plan which would desegregate the school system and make it a unitary system. This was to be done by July 1, 1970.

3. The Board did not comply with that order but instead appealed.

4. The California Supreme Court on June 28, 1976 affirmed this Court's order and remanded the case back to this Court for effectuation of the May 12, 1970 order. (Crawford v. Board of Education, 17 Cal.3d 280 [1976]).

5. The Board has not, even yet, complied with the said order. The Los Angeles School System during all those years has remained a segregated, not a unitary, system.

6. Following the aforesaid remand, the Board presented a plan to this Court which failed to comply with the writ of mandate and was so held by this Court. (Minute Order of July 5, 1977.)

7. The July 5, 1977 order required the Board to, within 90 days, present another plan to this Court which would comply with the writ of mandate and which would realistically commence the desegregation of the district by no later than February, 1978.

8. The Board failed to do so. Instead it presented a proposed plan (Exhibit 000 or Plan II) which this Court in the aforementioined February 7, 1978 order, held was not in compliance with the mandate but which this Court held was an important initial first step toward eventual compliance with the

writ. This plan contained some element of mandatory reassignment of students for desegregation purposes. Though held to be not consitutionally sufficient, this Court in the February 7, 1978 order permitted the Board to go forward with the partial and insufficient plan with the proviso that by December 31, 1978 the Board again present to the Court amendments and modifications to remedy the insufficiencies in order to complete "the [Board's] long delayed journey toward its stated goal of full racial integration of the district and . . . compliance with the court's mandate."

9. On March 16, 1979, respondent Board filed with the Court documents purporting to be in response to the February 7, 1978 order. Trial of the validity of the plan, consisting of that which the court had permitted to be

started by its February 7, 1978 order as modified by the Board's March 16, 1979 submission, was to begin on June 4, 1979.

10. Prior to June 4, 1979, respondent Board moved the Court for a continuance of that trial date. The motion was heard on May 30, 1979. It was pursuant to that hearing that the minute order of May 30, 1979 respondent Board seeks to modify was issued.

11. In said minute order of May 30, 1979, the trial date of June 4, 1979 was vacated. Trial eventually began on October 22, 1979 and completed on April 11, 1980 as above mentioned. As a condition of the vacation of the June 4, 1979 trial date, the May 30, 1979 order provided "because the Court . . . has not heard or listened to the amendments [to Plan II] and the objections thereto

. . . in order to maintain the status quo pending the continued hearing" that the Board "maintain the desegregation operation as nearly as possible without change pending the hearing." This continued in effect the mandatory assignments referred to above in Paragraph 8 of these Findings.

12. During the aforementioned trial, the Board abandoned its Plan II and the amendments and modifications thereto and sought leave to institute a so-called all-voluntary plan with no mandatory assignments for desegregation. In a separate order this Court has found that the so-called all-voluntary plan does not comply with the desegregation mandate of this Court.

13. As heretofore found, respondent Board has not yet complied with the 1970 order of this Court

requiring the Board to change the Los Angeles Unified School District from a segregated district to a unitary district. The district remains a segregated district.

14. Should any of the above findings of fact be deemed a conclusion of law, such conclusion of law is hereby made.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Facially, Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution requires the California Courts to apply federal law in school desegregation cases.

2. A federal court order

requiring a school board which has been found guilty of operating de jure a segregated school system to desegregate the system and in so doing to employ mandatory non-neighborhood assignments, is within the power of the Court. (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 [1971]).

3. A board of education which operated in the past a de jure segregated school system has been since that time and is now under a continuing federal constitutional duty to desegregate that segregated system. (Columbus Board of Education v. Penick, ___ U.S. ___, 61 L.Ed.2d 666, 99 S.Ct. 2941 [1979]; Dayton Board of Education v. Brinkman, ___ U.S. ___, 61 L.Ed.2d 710, 99 S.Ct. 2971 [1979]], If it has not done so, a federal court order

requiring it now to do so is within the power of the court. (Id.)

4. To the extent that this Court's order of February 7, 1978 and May 30, 1979 require the Los Angeles Board of Education to employ mandatory, non-neighborhood assignments as part of the methods of desegregating its de jure segregated system, such orders are within the meanings of the Swann, Penick and Brinkman cases, supra. Said orders are not, therefore, inconsistent with the amended Article I, Section 7(a) of the California Constitution, nor is this Court's order of May 12, 1970 nor that of the California Supreme Court of June 28, 1976. The remedy required by all is the same.

5. The provision of Proposition 1 requiring modification of existing judgments to conform to federal cases

and constitutional requirements, does not, therefore, change the previously issued mandate nor require any change in the orders made pursuant thereto.

6. Respondent Board's motion to modify the February 7, 1978 and the May 30, 1979 order should, therefore, be denied.

7. For like reason petitioners' request that Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution, be declared unconstitutional should be denied as being moot.

8. Should any of these conclusions of law be deemed a Finding of Fact, such Finding of Fact is hereby made.

Dated: _____, 1980

_____

JUDGE, SUPERIOR COURT

APPENDIX G

EXAMPLES OF SOME OF CALIFORNIA'S DISCRIMINATORY TREATMENT OF ITS MINORITIES BOTH OVERTLY AND BY SEEMINGLY NEUTRAL ENACTMENTS

A. In General

California's intentional, de jure, and legislative history of discrimination against its minorities, particularly Black, Hispanic and Asian, the three major ethnic groups whose rights are involved in this case, is an unhappy, albeit well known, fact. It was brought to the attention of the courts below. CT 13970-13982. For instance, in 1850 the Legislature enacted a statute which provided that "no Black or Mulatto person or Indian, shall be allowed to give evidence in favor of, or against a white man." The California Supreme Court applied it to the Chinese. Accordingly the murder conviction of a white man was reversed because the witnesses against him were Chinese. People v. Hall, 4 Cal. 399 (1854).

Many other statutes specifically discriminated against the Chinese. See e.g., Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (C.C.D. Cal. 1979) (No. 6,546) (hairstyle); In re Parrott, 1 Fed. 481 (C.C.D. Cal. 1880) (employment); In re Lee Sing, 43 Fed. 359 (C.C.N.D. Cal. 1890) (prohibition against living in cities or specific areas therein); Yick Wo v. Hopkins, 118 U.S. 356, (1886) (laundry buildings).

Legislation also discriminated against the Japanese. See e.g., Poterfield v. Webb, 263 U.S. 225, (1923); Fujii v. California, 38 Cal.2d 718 242 P.2d 617 (1952); and Oyama v. California, 332 U.S. 633, (1948) (all concerning the ownership of land); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (prohibiting Japanese from earning a living by commercial fishing).

Court sanctioned restrictive covenants forbade blacks and other non-whites to live on the land they owned. E.g., Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P.896 (1920). Those and other governmental action helped create residentially segregated neighborhoods. E.g., Banks v. Housing Authority, 120 Cal.App.2d 1, 260 P.2d 668 (1953).

Mexicans also were the object of restrictive covenants. E.g., Declaration of Conditions and Restrictions Governing Tract No. 11703, Los Angeles County (1945), quoted in I. Hendrick. The Education of Non-Whites in California, 1849-1970, page 86 (1977). They were excluded from places of public accommodation or allowed in only at certain times. "Satistics 1942," Report of Edward D. Ayres, Foreign Relations Division, Los Angeles County Sheriff's Office, p.2, quoted in Hendrick, supra, at 99.

California's anti-miscegenation statute was not struck down until 1948. Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17.

B. Discriminatory Ballot Measures

Proposition 14 on the 1964 ballot was held unconstitutional in Reitman v. Mulkey, 487 U.S. 369 (1967) It provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses.

Proposition 21 on the 1972 ballot was held unconstitutional in pertinent part in Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 530 P.2d 605 (1975). The portion struck down provided:

> No public school student shall, because of his race, creed or color, be assigned to or be required to attend a particular school.

C. Segregatory Legislation as to the Public Schools

All this was brought to the attention of the courts below. CT 13983-13992

For greater detail, see Hendrick, supra, passim, and C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975 (1976).

For example, the California School Census Act of 1855 provided that the apportionment of the state school fund to the several counties was to be made "in proportion to the number of white children as shown by the census taken by the school marshals." Hendrick at 7. Thus, the education of non-whites was explicitly inhibited because no money was received for their attendance. As the first active State Superintendent explained in lashing out against "the Negrophilist school of mock philanthropists" who sought to "introduce children of Negroes into our public schools" (Hendrick at 8):

> Until our people are prepared for practical amalgamation, which will probably not be before the mellenium, they will rather forego the benefits of our Schools than permit their daughters -- fifteen, sixteen and seventeen years of age

> plus to affiliate with the sons of Negroes. It is practically reduced to this, then, that our Schools must be maintained exclusively for white, or they will soon become tenanted by blacks alone.

Legislation in 1860 and 1863 allowed, but did not require, districts to establish separate schools for Negroes, Asians and Indians (Hendrick at 16), but it provided serious retribution in the form of lost revenue to those districts which did admit children of those races. (E.g. Cal. Stats. 1863, ch. 159, §68.)

The fourth State Superintendent, while acknowledging that black children were entitled to education, came down squarely for segregation (Hendrick at 16):

> The parents of colored children are taxed, and it is just that some provision should be made for their education; but the law requires, and public opinion demands that they should be educated in separate schools.

Black children were accordingly segregated. For instance, San Francisco Board of Education, Regulation 117, provided: "Separate Schools - Children of African or Indian descent shall not be admitted into schools for white children, but separate schools shall be provide for them in accordance with the

California School Law." See Ward v. Flood, 48 Cal. 36, 45 (1874). The local schools superintendent himself characterized the minority school as inferior. Hendrick at 18-19.

The Revised School Law of 1866 provided that local school boards might admit into schools for whites "half-breed Indian children and Indian children who live with white families or under guardianship of white persons." Id. at 16. Nonetheless, the California Supreme Court sustained separate schools for blacks and sanctioned the conduct of school boards refusing admission of blacks to white schools even while maintaining a neighborhood school attendance policy. Ward v. Flood, supra. In so doing, the Court called attention to the state statute (Acts 1869-70, §56) which provided that "the education of children of African descent, and Indian children, should be provided for in separate schools". Id. 48 Cal. at 48. The absence of provision for the education of Chinese children meant that school districts were relieved of all responsibility to educate such children, even in separate schools. And they were, indeed, excluded. Hendrick at 25, 32.

The Los Angeles Board of Education also participated in deliberate segregation. Here, "segregation was a way of life." Hendrick at 22.

The Los Angeles Board cooperated with white parents in establishing and maintaining black schools. Hendrick at

92-99, 102. The author concludes id. at 92): "School attendance zones already contributed to the definition of neighborhoods. . . Although Los Angeles school officials never agreed publicly to segregation, they did cooperate in seeing that segregation was accomplished, usually in the interest of maintaining community harmony."

On September 27, 1906, a separate "Oriental School" was established in San Francisco and the city principles were directed to send all Chinese, Japanese and Korean children to that school. Hendrick at 39.

Native Americans, like Blacks and Asians, were officially marked as an inferior race. Id. at 43. In 1860, legislation denied the use of state funds for the education of all racial minorities, including Indians. Id. Later, in 1864, legislation provided that district school trustees "shall establish" separate schools for Negores, Mongolians and Indians when parents or guardians of ten or more such children petitioned the Board in writing. The chance of Indians being able to meet such requirements was nil. Id. at 43. Even with encouragement and pressure from the federal government in the form of monetary incentives, public schools were reluctant to admit Indian children. Hendrick at 53. It took a court battle to admit Indian children living on reservations, even though no separate schools had been established for them. Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926 (1924).

Legislative sanction to require "non-American" Indians, Chinese, Japanese and Mongolian children to attend separate schools (Education Code §§8003 and 8004) was not repealed until 1947. (Cal.Stats. 1947, ch. 737, §1)

Despite the Mexican heritage of California, purposeful discrimination against Mexican children was rampant. "Respectable politicians and citizens could not face up squarely to the overt segregation of Mexican immigrants and the children of Mexican immigrants. The problem was one of maintaining the segregation of Mexican children, some of whom were natural born citizens of the United States, without appearing to discriminate against them." Hendrick at 56. The Los Angeles Board of Education, though it resisted white parents' pressure to segregate Mexican school children at first, succumbed by 1923. The Pasadena School Board had already done so. Hendrick at 82-92. Other school districts similarly accommodated. Id. at 100.

Section 3.3 of the School Code provided:

> "The governing board of the school districts shall have power to establish separate schools for Indian children, excepting children of Indians who are wards of the United States government and children of all other Indians who are descendants of the original American Indians of the United States, and for

children of Chinese, Japanese or Mongolian parentage."

Thus the statute accomplished the task of discriminating against Mexican children without saying so, naming Indians directly while releasing "American" Indians from legally mandated segregation (because of pressure from the Office of Indian Affairs of the United States government) and continuing the discrimination against the Chinese, Japanese, and other Asians. See Hendrick at 57. Segregation of Mexican school children remained legal until the courts ruled it unconstitutional after World War II. Westminster School District of Orange County v. Mendez, 161 F.2d 774 (9th Cir. 1947).

Efforts to maintain school segregation are not limited to the distant past. In the last decade, the Legislature and the electorate each undertook to preserve segregation in California schools.

In 1970, the State Legislature enacted Section 1009.5, now Section 35350 of the Education Code, which reads: "No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." See also Section 72209 (similar provision for minors attending community colleges). The transparent purpose of the provision was to thwart, by parental veto, mandatory

desegregation assignments. San Francisco Unified School District v. Johnson, 3 Cal.3d 933, 958 supra. To avoid such an unconstitutional result, the California Supreme Court construed the statute to mean only that a school board may not require a student to board a bus to get to school. That is, a board may not engage in "forced busing," but it may, and always has had the prerogative to, assign students for desegregation purposes.

The 1972 efforts by the voters to stop desegregation by adopting Proposition 21 on the November 7 ballot was mentioned above.

D. The Ballot argument on Proposition 1, made clear the purpose of the measure was to halt the ongoing desegregation in Los Angeles

E.g. "Proposition 1 does everything the people of California may legally do to stop court ordered forced busing in Los Angeles and in all other California school districts." (CT 14269)

E. The media message was to the same effect

Typical comments were (CT 13996,

14000, 14001 14004):

> "[A] twice-defeated measure introduced to overturn school integration programs in Los Angeles and some other cities easily cleared a Senate committee Wednesday."
>
> "The measure, aimed primarily at overturning the court-ordered integration program in Los Angeles, has qualified for the June 1980 ballot." [A special proceeding accelerated that time to the November, 1979 ballot]
>
> "It (Proposition 1) is aimed primarily at overturning Los Angeles massive, school integration program, now in its second year."
>
> "Proposition 1 . . . the Amendment sponsord by Senator Alan Robbins of Van Nuys, is obviously designed to end busing for integration in Los Angeles."
>
> "Proposition was drafted to stop Los Angeles' court ordered busing..."

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No. 81-38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD,
a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

JOINT APPENDIX

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August 1, 1963	Petition for Writ of Mandate filed
August 14, 1963	Respondent's Answer to Petition filed
July 6, 1966	Second Amended Petition for Writ of Mandate filed
October 14, 1966	Respondent's Answer to Second Amended Petition filed
October 28, 1968-June 9, 1969	Trial
May 12, 1970	Judgment and Writ of Mandate entered in favor of petitioners and against respondent
June 28, 1976	California Supreme Court modified and affirmed judgment and remanded case to Superior Court (17 Cal.3d 280, 531 P.2d 28 [1976])
March 23, 1977-June 28, 1977	Hearings in Superior Court regarding the first desegregation plan submitted by respondent
July 5, 1977	Order entered by Superior Court rejecting respondent's first desegregation plan and ordering respondent to submit a new plan

January 23, 1978- January 27, 1978	Hearings in Superior Court regarding second desegregation plan submitted by respondent ("Plan 2")
February 7, 1978	Order entered by Superior Court declaring that "patently ... plan[2] does not comply with [the] standard" required by the California Supreme Court's opinion but that it was "an important initial step toward the eventual compliance with the writ of mandate" and permitting respondent to implement the plan beginning in Septemberr 1978 subject to further examination by the Superior Court to remedy the omissions
May 30, 1979	Superior Court entered Minute Order continuing hearings to reexamine Plan 2 and prohibiting any change in the plan without court approval
July 30, 1979	Superior Court entered Minute Order denying petitiners' motion to expand Plan 2
October 22, 1979- April 11, 1980	Hearings to reexamine Plan 2 and consider alternative desegregation plans, including an all-voluntary plan proposed by respondent

November 15, 1979	Based upon the passage by the voters of an amendment to Article I, Section 7(a) of the California Constitution at the November 6, 1979 election ("Proposition 1"), respondent filed application to modify Superior Court's orders of February 7, 1978, and May 30, 1979, by terminating mandatory reassignment of pupils for the purposes of desegregation
December 19, 1979	Petitioners filed reply to respondent's application, contending that Proposition 1 is unconstitutional
January 21, 1980	Respondent filed motion to strike unofficial reports contained in appendix of petitioners' reply to respondent's application
May 19, 1980	Superior Court entered Minute Order (1) denying respondent's application to modify the February 7, 1978, and May 30, 1979, Orders, (2) denying as moot petitioners' argument that Proposition 1 is unconstitutional, and (3) declaring moot respondent's motion to strike unofficial reports contained in petitioners' appendix

July 7, 1980	Superior Court entered order requiring a new desegregation plan beginning in September 1980, which included student assignment for purposes of desegregation ("Plan 3")
July 10, 1980	Respondent filed Notices of Appeal from the preceding two Superior Court orders
August 6 and September 4, 1980	Court of Appeal entered stay orders modifying Plan 3 but permitting it to be implemented in September 1980 as modified
September 5, 1980	Petitioners filed Notice of Appeal and Designation of Record on Appeal from Superior Court's Order After Trial Upon Plan II and the Proposed All-Voluntary Plan dated July 7, 1980
December 19, 1980	Court of Appeal entered order and opinion vacating the Superior Court's May 19 and July 7, 1980, orders and declaring Proposition 1 constitutional (113 Cal. App.3d 633, 170 Cal.Rptr. 495 [1980], as modified January 15, 1981)
March 11, 1981	California Supreme Court denied hearing

SUPERIOR COURT, FINDINGS OF FACT AND CONCLUSIONS OF LAW, DATED MAY 12, 1970
[2 C.T. 543 - 3 C.T. 614]

FINDINGS OF FACT

I. The following allegations of the Pet. were admitted by the Ans. and therefore accepted by the Court as true:

I.1 "Respondent Board of Education of the City of Los Angeles (hereafter referred to as 'Respondent') is a governing agency administering the public schools with the district." (Par. 5 of Pet. admitted by Par. III of Ans.)

II. The following facts were either stipulated to or admitted or conceded, and therefore accepted by the Court as true:

II.1 "1. Petitioner Dolly Ruth Miles was a fourteen year old Negro child attending Markham Junior High School within the Los Angeles City School District.

"2. Petitioner Verde Darnell Miles was an eleven year old Negro child attending Ritter Elementary School within the Los Angeles City School District.

"3. Petitioner Maryann Miles was a seven year old Negro child attending public school within the Los Angeles City School District.

"4. Petitioner David Rodriquez was a six year old child of Mexican descent attending public school within the Los Angeles City School District.

"5. Petitioner Patricia Ann Sanchez was a twelve year old child of Mexican descent attending Soto Street Elementary School within the Los Angeles City / School District.

"6. Petitioner Raymon Jose Sanchez was a twelve year old child of Mexican descent who was enrolled in, and who subsequently attended, Hollenbeck Junior High School within the Los Angeles City School District.

"7. Petitioner Raoul Joaquin Sanchez was a twelve year old child of Mexican descent who was enrolled in, and who subsequently attended, Hollenbeck Junior High School within the Los Angeles City School District.

"8. Petitioner Karen Patricia Lynn Wheeler was a five year old Negro child who was enrolled in, and who subseqently attended, public school within the Los Angeles City School District.

"9. Petitioner Loretta May was a fourteen year old Negro child attending Markham Junior High School within the Los Angeles City School District.

"10. Petitioner Lenard May was a twelve year old Negro child attending Markham Junior High School within the Los Angeles City School District.

"11. Petitioner Autumn Renee Wright was a five year old Negro child who was enrolled in, and who subsequently attended, Trinity Street Elementary School within the Los Angeles City School District.

"12. Petitioner Alfred Graylin Wright was an eight year old Negro Child attending Mar Vista Elementary School within the Los Angeles City School District.

"IT IS FURTHER STIPULATED AND AGREED that:

"13. Annie Mary Miles, the guardian ad litem of petitioners Dolly Ruth Miles, Verde Darnell Miles and Maryann Miles is a Negro lady.

"14. Celia Rodrequez, the guardian ad litem of petitioner David Rodriquez, is a lady of Mexican descent.

"15. Josefa Sanchez, the guardian ad litem of petitioners Patricia Ann Sanchez, Raymon Jose Sanchez and Raoul Joaquin Sanchez, is a lady of Mexican Descent.

"16. Kaye Wheeler, the guardian ad litem of petitioner Karen Patricia Lynn Wheeler, is a Negro lady.

"17. Lucille May, the guardian ad litem of petitioners Loretta May and Lenard May, is a Negro lady.

"18. Margaret Wright, the guardian ad litem of petitioners Autumn Renee Wright and Alfred Graylin Wright, is a Negro lady." ("STIPULATION", dated January 26, 1970, Court's Exh. 79 for identification.)

II.2 "Respondent does not generally provide transportation for 'open school permits'." (Ans. to Interrogatory [Interr.] No. 7 (Pet's. 31-A.)) [Hereinafter: Petitioner's Exhibits will be designated "P.", followed by its number; Respondent's Exhibits will be designated "R.", followed by its designation; Points and Authorities filed will be designated, as to Petitioners, "P. Pt.A.", followed by the date of filing, and, as to Respondent, "R. Pt.A.", followed by the date of filing.]

II.3 "Permit policies of the Defendant (Exh. 3-C) do not provide free transportation or its equivalent to any pupil who was granted a permit to transfer

pursuant to said policy." (Ans. to "REQUEST FOR ADMISSION NO. 12" (P. 31-A, p. 14).)

II.4 "Exhibit [P.] 19A shows the date of original construction of each school listed in Exhibit A [of the Pet.] It also shows the year the original school was replaced." (Ans. to Interr. No 19 (P. 31-A, p. 166).)

II.5 "With respect to each of the schools listed in Exhibit A [of Pet.], the total amount expended each year in capital improvements to said school, commencing with school year 1962-63, is indicated in Exhibit [P.] 21A." (Ans. to Interr. No. 21 (P. 31-A, p. 166).)

II.6 "With respect to each of the schools listed in Exhibit B [of Pet.[, the total amount expended each year in capital improvements to said school, commencing with shcool year 1962-63, is indicated in Exhibit [P.] 21A." (Ans. (P. 31-B, p. 379).)

II.7 "That the subject matter of this action is a matter of interest to Negro pupils and pupils of Mexican descent attending the schools listed in Exhibit

A hereto." (Request for Admission No. 248 (P. 31, p. 114), admitted by Ans. (P. 31-B, p. 379).)

II.8 "Defendant maintains no records of racial or ethnic breakdown of student body population prior to November, 1966. * * * The following factors were not studied or considered because they would involve a change in existing policies of the Board of Education:

"(i) The effect of possible pairings or other combinations of schools with revised grade patterns;

"(ii) The effect of other approaches to improving the ethnic balance in the relevant areas and the District as a whole." (Part of Ans. to Interr. No. 151 (P. 31-B, pp. 303-304).)

II.9 "Defendant admits that the number of Negro and Mexican-American pupils attending school in the District is too large to permit all such pupils to be parties to this action." (Portion of Ans., Interr. No. 245 (P. 31-B, p. 379).)

II.10 "That all of the demands, plans, or requests specifically set forth in paragraph 16 of the Petition

were made upon respondent." (Ans. to Request for Admission No. 279 (P. 31, p. 118; 31-B, p. 391).)

II.11 That partial integration of the District would not be effective; and, "that the only way to have effective integration is at least district wide." That partial integration or attempted partial integration of the District, "for example, around the periphery of the ghetto, would not be an efficacious means of integrating these areas." (Stip., March 27, 1969; Transcript, Vol. 42, pp. 7751-54, 7774, line 6, to line 14, p. 7775.)

III. The following facts have been heretofore judicially found and adjudged as existing by the Supreme Court of the United States. (**Brown v. Board of Education of Topeka** [Brown I] (May 17, 1954), 347 U.S. 483, 74 Supreme Court 686, 98 L. ed. 873, 880-881.) The Court and the parties hereto are bound thereby. Board, as the agent and instrumentality of the State of California [State], is collaterally estopped from disputing said facts so found.

(i) "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. * * *

"Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

'" * * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the

community that may affect their hearts and minds in a way unlikely ever to be undone."

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

IV. This Court additionally finds true:

IV.1 Throughout the following Findings of Fact and Conclusions of Law:

(i) The word "segregated" as it refers to schools, and the words "segregated schools", without further description or elaboration or qualification thereof, such as "de jure" or "de facto" or "white", denote a school or schools in which the minority group (i.e., Negro, Mexican-American and Orientals) comprise all or substantially all or substantially in excess of fifty per cent of the student body of such school or schools; and

(ii) The words "racial imbalance" denote a school or schools whose student body or student bodies do not in its or their racial or ethnic composition approximately or substantially conform to the

approximate racial and ethnic composition of all Board's students in the District; and

(iii) The words "segregated white" or "white segregated" or "white" denote a school or schools whose students are all, or substantially all, or substantially in excess of 50%, White; and

(iv) Board is the governing Board of the Los Angeles Unified School District of Los Angeles County, an agency and instrumentality of the State of California [State], and therefore the word "State" or "State action" or "State involvement" refers to action or omission by said District through Board inasmuch as State is not directly a party hereto; and

(v) The word "District" denotes the Los Angeles Unified School District of Los Angeles County, of which Board is the governing body; and

(vi) The word "minority" denotes and includes students of Negro, Mexican-American,

Oriental and other non-white ancestry. The Mexican-American students are designated by Respondent as students of Spanish surname; and

(vii) The words "Respondent" or "Board" denote the Board of Education of the City of Los Angeles as the governing Board of the Los Angeles Unified School District of Los Angeles County, as an entity, and include its Executive Staff (Superintendent, Deputy Superintendent, Associate Superintendants, Assistant Superintendents, Division heads, Department heads, and their respective Assistants, and the Members of Board [Members]. The Members serve on a parttime basis. They have ultimate responsibility for: approximately 650,000 students attending Grades K through 12; 435 elementary schools; 73 junior high schools; and 54 senior high schools (including seven special or disciplinary high schools); an area of approximately 711 square miles; receipts, from all sources, and expenditure per school year of approximately $730,000,000; and approximately 48,000

employees. The Members, administratively, rely and must necessarily rely upon their Executive Staff [Staff], the Superintendent, Deputy Superintendent, Assistant Superintendents, Associate Superintendents, Division and Department heads, and the Assistants to each thereof, and other full-time employees on the Executive Staff. Board does not have a Lawyer or Efficiency Expert or Expeditor or Executive Officer or Economist or Business Administrator accountable only and directly to it and Members. Although Board is free to adopt whatever resolutions it may choose for the governing of the District, it generally adopts the resolutions proposed by the Staff, is entirely dependent upon Staff for the carrying out and fulfillment thereof and, by reason of the Staff's purported expertise, generally accepts Staff's reasons, excuses and rationalizations for the nonfulfillment thereof.

The findings hereinafter of acts, omissions and bad faith on the part of Board in its creating and maintaining and perpetuating of segregation of its

minority students in its schools, and in its failure and omission to integrate its schools, are not intended to be and are not findings of personal bad faith or personal acts or omissions on the part of the Members of the Board, but rather are intended to be and are findings of acts, omissions and bad faith on the part of Board as an entity operating by and through its Executive Staff, the operations of which may or may not have been known to or intended by each Member of Board.

IV.2 That Petitioners and all of the class on whose behalf the Petition was filed and proceedings had are citizens of State, free from any disability, qualified, entitled to and required by law to attend, do attend, and entitled by law to equal educational opportunities in, the public schools of Board, free from discrimination, directly or indirectly, by Board.

IV.3 That, prior to 1966, Board did not maintain any records of the racial or ethnic composition of its schools or officially assemble or collect ethnic data of

or pertaining to its schools. It only commenced to do so when required by State, in 1966.

IV.4 That, from 1962 through 1966, representatives of organizations such as the American Civil Liberties Union of Southern California made many presentations, both oral and written, to the Board, in which such representations requested and urged action on various substantive matters relating to integration, including, among other things, the taking of a school-by-school racial consus at intervals, progress toward integration of pupils and teachers in the schools of the District, restudying and reshaping construction bond proposals in the interest of integration and the like.

IV.5 That, in 1966, Respondent had approximately 627,000 pupils who attended 543 schools; these 543 schools consisted of 429 elementary schools, 71 junior high schools and 45 regular senior high schools (excluding 7 special or disciplinary high schools).

In 1967, Respondent had approximately 641,000 pupils who attended 549 schools; these 549 schools

consisted of 432 elementary schools, 71 junior high schools and 46 regular high schools.

In 1968, Respondent had approximately 648,000 pupils who attended 555 schools; these 555 schools consisted of 435 elementary schools, 73 junior high schools and 47 regular senior high schools.

In 1968, the racial and ethnic composition of students enrolled in Grades K through 12 in the schools of the District was as follows: 20% Mexican-Americans; 22.6% Negro; 3.6% Oriental; 0.2% American Indian and 53.6% White.

IV.6 That, in the Fall of 1966, of a total of 429 elementary schools; 165 schools were minority-segregated; 59 schools were Mexican-American segregated; 74 schools were Negro segregated; in 3 schools, the combined minority school population, consisting of Oriental, American Indian and other non-white students, was greater than fifty per cent; 263 schools were majority white; and 29 schools had other combined minorities in excess of fifty per cent but

where no one minority group exceeded fifty per cent of the student population. (P. 33.)

IV.7 In September, 1966, two new elementary schools were opened; (1) Ambler Avenue and (2) Brainard. Ambler was, upon its opening, more than fifty per cent Negro; Brainard was, upon its opening, more than fifty per cent White.

IV.8 In February, 1967, the only new elementary school opened was Beckford Avenue School. Its student body was, upon its opening, more than ninety per cent White.

IV.9 In September, 1967, the following new elementary schools were opened: Broadacres with, upon its opening, more than fifty per cent of the pupils being Negro; Pomelo Drive School with, upon its opening, a school population in excess of fifty per cent White; and President Avenue School with, upon its opening, more than fifty per cent of its pupils being White.

IV.10 During 1968, the following new elementary schools were opened: Hyde Park Boulevard School with, upon its opening, a student population of over fifty per cent Negro and ninety-five per cent combined minority; Park Avenue School with, upon its opening, about seventy-eight per cent of its students being White, and twenty-two per cent being combined minorities; and Van Gogh Street School with, upon its opening, the student population being about ninety-three per cent White, and seven per cent combined minorities. (P. 33, 34 and 34-B.)

IV.11 As of the Fall, 1966, there were 71 junior high schools in the District. Thereof: 13 were substantially over fifty per cent Negro; 6 were substantially over fifty per cent Mexican-American; 4 were substantially over fifty per cent combined minorities; and 48 were White.

In 1966, Holmes Junior High School was opened. In the Fall of 1966, its enrollment was approximately ninety-eight per cent White.

No junior high schools were opened during 1967.

In 1968, 2 junior high schools were opened. Bethune Junior High with, upon its opening, an enrollment of 1,585 Negro, 34 Mexican-American, and 10 White; Lawrence Junior High with, upon its opening, an enrollment of 1,512 White, and 64 minority pupils.

IV.12 In 1966, there were 45 regular senior high schools in the District. Thereof: 5 regular senior high schools had enrollments of more than fifty per cent Mexican-Americans; 30 regular senior high schools had enrollments in which White pupils exceeded fifty per cent of total enrollment; 6 regular senior high schools had enrollments of Negro pupils exceeding fifty per cent of the total enrollment; and 4 schools had combined minority enrollments exceeding fifty per cent of the student population.

IV.13 In 1967, Locke High School was opened. Its enrollment in the Fall, 1967, was 19 Mexican-American, 3 White, 1,821 Negro, and 2 Oriental.

In 1968, Crenshaw High School was opened. Its enrollment in 1968 was 35 White, 2,321 Negro, 98 Oriental and 41 Mexican-American.

IV.13.A That Staff, and therefore Board, knew or in the exercise of reasonable care should have known, at the time of the selection and purchase of the sites for, and at all events at the time of the letting of the Contracts for the construction of the school plants on said sites, its said schools the subjects of the foregoing IV.7 and IV.8 and IV.9 and IV.10 and the schools named in lines 24 and 25 and 27 to 30, Page 14, a portion of IV.11, and IV.13, that said schools and each of them would upon its opening be racially imbalanced and either Negro segregated or minority segregated or white segregated.

IV.14 From 1966 to 1968, the number of elementary schools containing fifty per cent or more Negro pupils increased from 74 to 80; the number of junior high schools containing fifty percent or more Negro pupils increased from 13 to 15; the number of

senior high schools containing fifty per cent or more Negro pupils increased from 6 to 9. From 1966 to 1968, the number of elementary schools containing fifty per cent or more Mexican-American pupils increased from 59 to 66; the number of senior high schools containing fifty per cent or more Mexican-American pupils increased from 5 to 7; and the number of junior high schools containing fifty per cent or more Mexican-American pupils increased from 6 to 8.

From 1966 to 1968, the number of elementary schools containing fifty per cent or more combined minority pupils increased from 29 to 30; the number of junior high schools containing fifty per cent or more combined minority pupils were 4 in 1966, 4 in 1967 and 3 in 1968; and the number of senior high schools containing fifty per cent or more combined minority pupils dropped from 4 in 1966 to 1 in 1968. In the Fall of 1968, 7 of the 9 predominantly Negro high schools had minority enrollments of ninety to one-hundred per cent, 13 of the 15 predominantly Negro junior high

schools had minority enrollments in excess of ninety per cent and 72 of the 80 predominantly Negro elementary schools had minority enrollments in excess of ninety per cent.

IV.15 From 1966 to 1968, of Boards school's; (i) Its elementary schools containing fifty per cent or more Negro pupils increased in number from 77 to 80. (ii) Its junior high schools containing fifty per cent or more Negro pupils increased in number from 13 to 15. (iii) Its senior high schools containing fifty per cent or more Negro pupils increased in number from 7 to 9. (iv) Its elementary schools containing fifty per cent or more Mexican-American pupils increased in number from 57 to 65. (v) Its senior high schools containing fifty per cent or more Mexican-American pupils increased in number from 5 to 6. (vi) Its junior high schools containing fifty per cent or more Mexican-American pupils remained in number at 8. (vii) Its elementary schools containing fifty per cent or more combined minority pupils increased in number from 30

to 32. (viii) Its junior high schools containing fifty per cent or more combined minority pupils were 3 in 1966, to 5 in 1967 and 3 in 1968. (ix) Its senior high schools containing fifty per cent or more combined minority pupils dropped in number from 3 in 1966 to 2 in 1968.

IV.16 In the 1968-69 school year, of Board's schools; (i) 8 of the 9 predominantly Negro segregated high schools had minority enrollments of ninety to one hundred per cent. (ii) 13 of the 15 predominantly Negro segregated junior high schools had minority enrollments in excess of ninety per cent, and (iii) 72 of the 80 predominantly Negro segregated elementary schools had minority enrollments in excess of ninety per cent.

IV.17 In 1966, of Board's schools: (i) 66.8% of the Mexican-American pupils, 94.5% of the Negro pupils and 52.8% of the Oriental pupils in the District were enrolled in schools having enrollments of fifty per cent or more Negro, fifty per cent or more Mexican-American, fifty per cent or more Oriental or fifty per

cent or more combined minority pupils: (ii) approximately 97% of the students enrolled at the predominantly Negro segregated schools were minority pupils; approximately 90% of the students enrolled at the predominantly Mexican-American segregated schools were minority pupils; and 93% of the students attending the predominantly Oriental segregated schools were minority pupils; and (iii) only 14.2% of the minority pupils in the District were enrolled in schools having fifty per cent or more White enrollment.

IV.18 In 1967, in Board's schools: (i) 65.2% of the Mexican-American pupils, 97.3% of the Negro pupils, and 66% of the Oriental pupils in the District attended schools having enrollments of fifty per cent or more Negro, fifty per cent or more Mexican-American, fifty per cent or more Oriental or fifty per cent or more combined minority pupils; (ii) approximately 89% of the students enrolled at the predominantly Mexican-American schools were minority pupils; approximately

96% of the students enrolled at the predominantly Negro schools were minority pupils; and 96% of the students enrolled in predominantly Oriental schools were minority students; and (iii) only 14.4% of the minority pupils in the District attended schools having fifty per cent or more White enrollment.

IV.19 In 1968, in Board's schools: (i) 68% of the Mexican-American pupils, 94.8% of the Negro pupils, and 56.8% of the Oriental pupils in the District attended schools having enrollments of fifty per cent or more Negro, fifty per cent or more Mexican-American, fifty per cent or more Oriental, or fifty per cent or more combined minority pupils; (ii) approximately ninety per cent of all pupils enrolled in the predominantly Mexican-American schools were minority pupils; 97% of the students enrolled in the predominantly Negro schools were minority pupils; and 95.2% of the students enrolled in the predominantly Oriental schools were minority pupils; and (iii) only 14.8% of the District's minority students attended

schools having fifty per cent or more White enrollment.

IV.20 In 1968, in Board's schools: (i) more than 183,000 White pupils in the District, almost 53% of the total White enrollment, attended white segregated schools having less than ten per cent minority enrollment; (ii) only 27% of the elementary schools, 32% of the junior high schools and 30% of the senior high schools had not less than ten per cent nor more than 49% minority enrollment, the remainder of the student population at those schools being White. The remaining schools, i.e., 73% of the elementary schools, 68% of the junior high schools and 70% of the senior high schools had fewer than ten per cent or fifty per cent or more minority enrollment.

IV.21 That the schools which were segregated, minority and white, in 1966, have remained and will continue to remain segregated. They were caused to be segregated and will continue to be caused to remain segregated by Board by, among other acts, mandating

neighborhood school systems, site selection, mandating school attendance areas and boundaries of such schools, transportation policies, and restrictive, impracticable and non-effective, for integretion, transfer policies.

IV.21A That, subsequent to 1963, none of the school sites selected by Staff and purchased by Board were situated or purchased for, and none of the schools constructed thereon by Board were constructed for, and none of the schools thereon opened by Board were opened for or designed to, in location or school attendance boundaries effectuate desegregation or integration in education.

IV.22 That the opportunity for an equal education in our public schools as a minimum equal to that afforded the socio-ecomonic advantaged is indispensible to a meaningful life; to the preservation of our democracy, our form of government and society. Its deprivation from any segment of our people is a denial of their rights as human beings, including their

inalienable rights of life, liberty and pursuit of happiness as citizens of our State and Country. Education is a basic right because it is indispensable to the development of human beings.

Education is the developing and training of the mental, physical, moral, cultural, philosophical and social powers and capabilities of the human being, of good citizenship, of the awakening of the child to, and his motivation to achieve, cultural values which help him adjust normally to his environment; it prepares the child for later training and to become able to support himself and his later family, to enjoy his life and his liberty and to pursue happiness. A child may not reasonably be expected to succeed in life if he is denied the opportunity fo equal education. Equal educational opportunity means that every child shall have an equal opportunity to learn to the best of his or her ability; such opportunity must be made available to all on equal terms. There is an inalienable right on the part of every child in our State to an equal education.

Education is one of the most important functions of state and local governments. Compulsory school attendance laws and the vast expenditures for education (for example, Board spends approximately $730,000,000 per fiscal year) demonstrate the importance of education in our democratic society.

IV.23 The Los Angeles Unified School District of the County of Los Angeles [District] is and at all times herein involved was a school district of the State of California [State]. Respondent [Board] is the governing board of said school district. District and therefore also Board is an agency, an instrumentality of State for the local operations of the State School System and for the observance and performance of the constitutional duties and obligations of State to educate, to provide equal educational opportunity to all of the children of State, including those within District. Herein, "District" and "Board" are used interchangeably. "District" includes "Board"; "Board includes "District".

Board may not therefore use its funds to create or maintain or perpetuate segregated eudcation.

IV.24 That Negro and Mexican-American children suffer serious harm when their education takes place in public schools which are racially minority or Negro or Mexican-American segregated, whatever the source or cause of such segregation may be. Negro and Mexican-American children who attend either wholly or predominantly minority or Negro or Mexican-American segregated schools do not achieve as well as other children—Negro, Mexican-American and White in integrated schools. Their, the minority, aspirations become more restricted than those of other children. They do not have as much confidence that they can influence their own futures. This factor—destiny control—bears a substantial relationship to academic achievement. When such pupils become adults, they are less likely to participate in the mainstream of American society, and more likely to fear, dislike and avoid white Americans. Public school minority

segregation affects their hearts and minds in ways unlikely ever to be undone. The harm results from the deprival of equal educational opportunity by segregation, which generates attitudes substantially detrimental to, if not destructive of, motivation to learn and achieve. Negro and Mexican-American children are caused by segregation to believe that their schools are stigmatized and regarded as inferior by the community as a whole. Their belief is shared by their parents and by their teachers. Their belief is founded in fact.

IV.25 It is not and would not be enough, even if the minorities in Board's segregated schools were, but they have not been and are not being, taught properly, for there are other vital considerations. All children must learn to respect and live with one another in multi-racial and multi-cultural communities, and the earlier they do so the better. It is during their formative school years that firm foundations are laid

for good citizenship and broad participation in the mainstream of affairs.

IV.26 That segregation of children in Board's public schools deprives Negro and Mexican-American children of educational opportunity, irrespective of whether such segregation is legally or otherwise classified as "de facto" or "de jure".

If Negro and Mexican-Americans are ever to enter the mainstream of American life, when they be school children they must have equal educational opportunity with white children.

An integrated education affords better educational opportunities to both minority and white children.

IV.27 Negro and Mexican-American students in Board's minority segregated schools do not receive equal educational opportunity measured either by educational inputs or outputs. There are significant differences and disadvantages when compared, measured and valued with Board's white schools.

Minority segregated schools do tend to result in lower aspirations, lower achievement, lower educational competition and attitudes, compared to pupils who attend white schools or integrated schools. Minority segregated schools tend to induce disbelief particularly on the part of Negro and Mexican-American pupils in their ability to learn and a lack of qualifications.

Board's segregated schools, the plant, teachers and physical facilities are in fact of less quality.

Board knew or had reasonable cause and grounds and knowledge to know of the facts of this Paragraph IV.27.

IV.28 That the plant, teachers, physical facilities and curriculum at Board's minority segregated schools are in fact of poorer quality than the plant, teachers, physical facilities and curriculum at its predominantly white schools.

Throughout the relevant period herein involved, Board's separate but allegedly equal schools were in

fact not equal in quality or efficiency or plant or facilities or teachers or curriculum or pupil congestion (i.e., the segregated minority schools have been more overcrowded), to Board's white schools.

IV.29 That segregated education tends to induce and create, both on the part of the minorities and whites, racial intolerance, misunderstanding, suspicion and fears. Integration of education substantially tears down the misunderstandings and fears that are based on ignorance of what the other person is really like. The opportunity thereby to learn that all persons are human beings, to alleviate the fears, ignorance, prejudices and bias otherwise existing, the teaching and the opportunity to learn thereof is as much a part of the educational opportunity of the majority as of the minority. Only thus can the democratic ideals of liberty, equality under law, worth, freedom and dignity of every person be taught or experienced.

IV.30 That minority segregated schools result in schools of predominantly low socio-economic status.

It adds a stigma both to the minority pupil and the minority segregated school he is compelled to attend. The stigma is inimical to achievement and tends to erode further educational motivation and aspirations of the segregated minority.

IV.31 That segregated education results in the assignment of academic grades within the segregated school unrelated to real performance. Segregated education causes and results in higher "drop-out" rates for Negro and Mexican-American students, who are compelled by Board to and therefore attend minority segregated schools, than for pupils who attend white or integrated schools.

IV.32 That Negro and Mexican-American pupils in Board's segregated schools have not been taught as efficiently and effectively with the same emphasis, compassion and understanding, as White pupils have been taught in the white schools. The more teachers expect from their students—however disadvantaged those students may be—the better the students

perform. Conversely, negative teacher attitudes act as self-fulfilling prophecies; teachers expect little from their students, and the students fulfill the expectation. Children who are treated as if they are uneducable invariably become uneducable.

IV.33 That there can be no equality of education "input" without integrated education. Only thereby will all students receive the same basic "inputs", to wit, plant, books, teachers, curriculum and facilities so that each shall receive his just share. That is the equality of education, the equality of "inputs" and the opportunity of general educational "output". The opportunity for improved educational "output", i.e., academic achievement, is substantially affected by equality of educational "inputs" brought about by integrated education.

IV.34 That though it is true that generally educational "output" is personal to each student dependent upon many factors as human beings, and the law does not and could not legislate equal ability to

achieve, Board may not justify its lack of equal opportunity in "input" by the alleged superiority of "outputs" of the White sutdents.

Board postulates that having a group, white, whose "output" makes a better showing for Board and its educational system, it therefore should concentrate thereon and only from any excess funds attempt to achieve through integrated education the same "outputs" by the minority. That may be Board's educational concept, but it is not the constitutional concept for equal opportunity to learn, the right initially to be fed equal "inputs" at the source of the stream of man's humanity.

IV.35 That academic achievement and learning related attitudes of Negro and Mexican-American students substantially improve when such students attend schools whose enrollment consists of more than fifty per cent White pupils. In those predominantly white schools in which minority pupils constitute only a token presence (i.e., less than ten per cent of the

total pupil enrollment), feelings of isolation and alienation on the part of such minority pupils are reinforced and strengthened. A school which has only a token presence of minority pupils is regarded by the community as a white school, and a school which has fifty per cent or more minority pupils is regarded by the community as a minority school. Only a school whose enrollment reflects the ethnic and racial composition of the pupils in the District is regarded by the community as a "common" or community school.

IV.36 Board has and is, since at least May of 1963, knowingly, affirmatively and in bad faith, without regard for its legal and fiduciary duties to its pupils, by and through its actual affirmative policies, customs, usages and practicies, doings and omissions, segregated, de jure, its students, in that it did at all times herein involved and still is doing and will continue to do so, unless and until commanded otherwise by the Court, among other things:

(i) adopted, adopts, and slavishly practiced and practices and adhered to and still adheres to a policy of selecting and purchasing sites and buildings neighborhood schools without regard to desegregation or integration. Board did and is doing so within racially imbalanced, segregated ghetto areas; knowing and intending that the students of the area were and would be by it required to attend thereat. It has and is establishing mandatory attendance areas and boundaries around its neighborhood schools so as to create or perpetuate segregated schools; and

(ii) Set and is still setting its school attendance areas and boundaries without regard to its duty not to create or perpetuate racially imbalanced and segregated schools. The attendance boundaries were and are knowingly set, knowing, or having reasonable cause to know, that the school affected thereby was or would be or become or be perpetuated as a minority segregated school or a white segregated school or a racially imbalanced school. Board knew

and knows that its rights and powers to establish school attendance areas was and is subject to constitutional guarantees of equal protection of the law and due process of law; and

(iii) Has not to the time hereof adopted or instructed or directed its Staff, including its Department charged with establishing and modifying school attendance boundaries, of any definition of equal educational opportunity or educational integration or segregation or desegregation or racial balance or racial imbalance; and

(iv) Failed to establish Feeder School Policies that would create or facilitate integration or desegregation or racial balance. It knew, or in the exercise of reasonable care should have known, that the policies established by it created or perpetuated racial imbalance and segregation; and

(v) Established and still directs and maintains transportation policies for its students which in fact created or perpetuated segregation. Students

living 2-1/4 miles from an elementary school, 2-3/4 miles from a junior high school and 3-1/4 miles from a senior high school are not provided with transportation. Board knew that many if not substantially all of the socio-economic disadvantaged students could not and cannot afford private transportation to schools outside of the area of nontransportation, and therefore that its transportation policy would cause substantially all, if not all, theeof to be compelled to and attend a segregated neighborhood school; and

(vi) Does not provide and has not provided free transportation or its equivalent to any pupil who was or is granted a permit to transfer pursuant to its transfer policies and practices. Board has not provided and does not provide free transportation or its equivalent for or with respect to so-called "open school" permits; and

(vii) Taken and still takes the legal position that it would and will only expend sums to create racial balance (though it had and has not officially

defined what constitutes racial balance) and would and will only affirmatively attempt to create, other than by token effort for public relations purposes, integration from surplus funds, surplus to all of its programs which it deemed and deems necessary or desirable, in its sole and arbitrary discretion, for the accomplishment of educational "output", which surplus funds it defines as that given to it by outside grants, either federal or state; and

(viii) Constantly taken and takes the position, without first having made any study of the cost thereof and without knowledge of the cost thereof, that the cost of providing integrated education would and will wrongfully require it to divert such large financial or other resources from its academic programs that the academic achievement of all of its pupils will be caused to and will suffer a significant decline.

Board has not at any time evolved, nor will it, unless and until commanded by the Court to do so,

evolve any plan or plans or the methods, means, manner, tools, designs and techniques for the integration or approximate integration of its schools, or for the desegregation of its minority segregated schools or for the creation of racial or ethnic or approximate racial or ethnic balance in its schools.

Board has not even commenced an in-depth study so as to enable it to evolve any such plan or plans or the designs, tools, manner, means, methods and techniques for the effectuating of any such plan or plans.

During the course of the trial of this cause, without any prior study of or evolving of any such plan or plans or of the methods, designs, tools, manner, means and techniques for the effectuating thereof, and solely for the purpose and with the objective of attempting to support its aforefound contention and position re the costs of providing equal education opportunity through integrated education, Staff, in

December, 1968, directed its Director of Transportation, who was not and is not an educator, to prepare for presentation to the Court a "Report on a Preliminary Survey to Determine the Feasibility and Estimated Costs of Totally Integrating the Regular Schools of the Los Angeles Unified School District by Means of Bus Transportation" (Exh. R. 376) (Report). Board and its Staff had known and knew prior thereto, at least since 1965, that bussing was but one of many "designs" [Exh. R. 373—3-A, Par. 19], methods, manner, tools, means and techniques for the carrying out of a plan or plans of integration, desegregation, and achievement of racial and ethnic balance in its schools; and that there existed and exists a substantial number of designs, plans, tools, methods, means and techniques therefor. (Exhs. R: 373-2; 373-3; 373—3-A, "Methods of Desegregation"; 373—3-B; 373-5; 373-6; 373-8, "Eastern Cities Survey - Principals Derived"; 373—8-A; 373-9; 373-11, "Potential Plans for Los Angeles Schools"; 373-12).) Nevertheless, Staff

directed the preparation of the Report as if bussing were not merely one of the designs or tools to be utilized in carrying out a prior evolved and adopted plan but "the" means, manner, method and technique of integration and desegregation and of creating racial and ethnic balance in Board's schools.

The Report was not the result either of any study of integration or desegregation or correction of imbalances of Board's schools; it was not the result of computation of costs of any evolved and/or approved, by Board, plan of integration or desegragation or correction of imbalances of Baord's schools which it contemplated or even was thinking about adopting. The Report was not the result of any "survey" conducted by Staff's Director of Transportation or Staff or Board. The Report was and is only a theoretical computation designed and intended by Staff to produce the highest, largest possible costs and expenses of the longest possible distances of transportation, including every possible facet thereof,

as the purported and only plan, method, manner and techniques of integration, desegregation and balancing, racial and ethnic, of Board's schools, and as a purported justification of the non-performance by Board of its duties specially imposed by law, to wit, to not deprive any of its pupils of equal educational opportunity.

The Court finds: That said Report was not made in good faith. That bussing is not "the" or "a" "means" of integration in Board's schools; it is only a design or tool for the effectuating of a plan or plans of integration. That Board knew or in the exercise of reasonable care should have known: that said Report was not made in good faith; that it was not and is not a plan or method or means of integration or desegregation or balancing of the racially and ethnically imbalanced schools of Board; that said Report was not and could not be and did not constitute legal or any justification of the non-performance by Board of any

duties specially imposed by law upon it, and particularly did not and could not justify or constitute any legal cause for or justify its depriving any of its pupils of equal eudcational opportunity; and

(ix) Contended, contends, asserts, and acts thereunder, that separate but allegedly equal schools are equal educational opportunity; and that, unless and until it is compelled by the Court to do otherwise, it will continue to perpetuate its segregated schools, will not desegregate them, will continue its said neighborhood school policy, by selecting sites and building schools thereon whether segregated or not

The Court finds: That, throughout the period of time involved, Board's separate but allegedly equal schools were not, in fact, equal, either as to plant or facilities or teachers or curriculum. That Board has not made available to all its pupils equal educational opportunity; and

(x) Asserted, asserts and contends, as its educational policy and as its legal position, that

integrated schools are not reasonably necessary to equal educational opportunity; that there is no legal mandate, constitutional federal and/or state, or statute of state, which imposes any duty upon it to desegregate its segregated schools or to remedy the racial imbalance in its schools or to integrate its schools, and that it will not so do unless and until it, in its absolute, arbitrary and uncontrolled discretion, believes it to be "feasible" to do so; and

(xi) Expended the public monies received by it (amounting to billions of dollars) in creating, maintaining, protecting and perpetuating its segregated and racially imbalanced schools; and

(xii) Assigned, assigns, compelled and compels pupils to attend schools on the basis of geographic criteria, knowing that such assignments created or would perpetuate racial imbalances and segregation.

Board had, and knew that it had, the power and the duty specially imposed by law upon it, though denied

by it: To adopt school assignment policies that would incorporate other than geographical criteria, i.e., policies that would rectify the existing racial imbalances and that would create or tend to create racial balance and integration; to select school sites for that aim, purpose and end; to readjust attendance zones and areas and to select school sites to meet and overcome the effect of population movement. It knew, or should have reasonably known, of the population movements within its District. Board did not execute or perform these or any of these powers or perform those or any of those duties specially imposed by law upon it.

IV.37 Board's schools which were segregated, minority and white, in 1966, have been and will continue to remain segregated; such segregation has been caused and will continue to be caused by Board's policies, practices, customs, usages, doings and omissions as found in these Findings of Fact, and particularly in IV.36.

IV.38 None of Board's schools opened subsequent to 1963 was designed, in its location or in the drawing of its attendance boundaries, to effect desegregation or integration in education.

IV.39 That Board asserts as its obligation and duty:

> "The respondent board of education is concerned primarily with school effects—with student's achievement. It views school inputs not as ends in themselves, but only as factors which affect students' achievement. For purposes of illustration, suppose it is true that there exists in a school district one group of schools whose student bodies are composed predominantly of white students and another group of schools whose student bodies are predominantly Negro (or other minority) students. Suppose also that the average achievement of white pupils is substantially greater than that of Negro students. Using achievement as the criterion of equal educational opportunity, it is obvious that Negro students do not have equal educational opportunity because they are not achieving as well on the average as white students. What are the school district's obligations under such state of facts? As viewed by the respondent board its obligation is to raise the average achievement of the Negro students as close as it possibly can within the limits of its available resources to that of the white students. Again, viewing equal educational opportunity in a substantive sense—in terms of educational results—

the board should allocate its resources to student education in such manner as to minimize the disparities between the average achievements of Negro and white students. On the other hand respondent board does not believe it to be its obligation to effect equality of educational achievement by so withdrawing academic offerings from white students that the average academic achievement of white students diminishes to the level of achievement of the Negro students. To use a rarer extreme example for illustrative purposes, the respondent board would not consider it proper to reduce the basic high school offering to a three-period day, and then use the monies thus saved for compensatory education of Negro students.

"In the view of the board of education it should provide to all students a minimum educational offering in such amount and quality that the average achievement of the racially higher achieving group will not substantially decline. In addition the school district should provide to racial minorities, to the extent that it has the financial wherewithal, educational offerings in addition to the basic minimum offering to attempt to close the gap between the average achievement of white students and that of the racial minorities." (R. Pt. A. 8-22-69, line 11, p. 13, to line 16, p. 14.)

The Court finds true: That it is the duty, specially imposed by law, of Board to provide to all of its pupils the same equal educational opportunity in amount and

quality by and through integrated education, without regard to race or color or creed or nation of origin or economic circumstance or social status. That, in addition, to the extent that Board has the financial wherewithal, to offer to all of its pupils, minority and majority alike and equally, to have the educational opportunity thereof.

IV.40 The Court finds the following assertions of Board to be true, to wit: That Board has only provided and now only provides " * * * to all students a minimum educational offering in such amount and quality that the average achievement of the racially higher achieving group will not substantially decline". That "prejudice, bias and misunderstanding in society may tend to be reduced through closer contact of individuals of different races and cultures".

IV.41 That Board has not in good faith created, studied, analyzed, tested or understood the effects upon the education of minority pupils or white pupils of integrated schools or racially balanced schools

operated for a school generation (i.e., kindergarten through 12th grade) or other substantial period of time. Board's position and conclusions are based solely on tests administered to minority pupils attending respondent's low socio-economic minority segregated schools, i.e., schools in which educational opportunity is not and has not been equal to the educational opportunity offered in the white segregated schools.

IV.42 That the inherent right to an education, equal educational opportunity by and through equal integrated schools so that the opportunity to learn received by one is received by all, cannot be denied or abridged upon the fears or assumptions or grounds, if they exist, and which the Court finds not true: That whites are superior in learning ability and therefore have rights to a white segregated or superior or better education than minorities; or that the white will be held back if deprived of educational opportunities; or that the average academic achievement of white

pupils will diminish to the level of achievement of the Negro pupils by integrated education.

IV.43 Citizenship, its rights, privileges and duties, knows no color. Schools, equal educational opportunity, should know no color between its pupils. There is no right to, the duty specially imposed by law upon Board prohibits, minimization of cost of education of the minorities, whether socio-economically disadvantaged or not, so as to enable the alleged "racially higher achieving group" to achieve higher grades, receive better, higher-quality education, greater achievements, and be prepared for a better life than the minorities and at their expense. Only when all, equally, have been provided with equal educational opportunity and those of the minorities requiring it, created by the heretofore segregated education, have received educational offerings, in addition to the minimal, given to attempt to close the gap between the average achievement of the white pupil and that of

the racial minorities, will Board have performed its duty imposed by law.

IV.44 Board's policy and action thereunder to perpetuate in favor of the white pupils the disparity which it has found to exist between the whites and the minorities was and is caused to exist or continues to exist by Board's segregated schools. That is educational discrimination. It is a denial of equal protection of the laws, of due process of law, of the inalienable and constitutional rights, the right to be a human being.

IV.45 Board's acts in having heretofore, now and which it will continue, only to provide to " * * * all students a minimum educational offering in such amount and quality that the average achievement of the racially higher achieving group will not substantially decline" was, constituted, constitutes and is and will continue to constitute State action. It constituted, constitutes and will continue to constitute discrimination against the minorities in favor of the

whites. It created, creates and perpetuates the said disparity caused to exist and existing by Board by and through its segregated schools and thereby segregated education.

IV.46 Partial integration (e.g., on the periphery of the ghettos) would not be, is not and will not be effective; the only effective approach to educational integration of District is on a district-wide basis.

IV.47 An effective plan of integration, for the creation of racial balance in, and the elimination of racial imbalance from, Board's schools must be mandatory. An effective integration plan and the methods, means, mechanics, designs, tools and techniques of achieving racial balance, must be designed to and work in the direction of its objectives.

IV.48 Board's alleged "open enrollment" policies (referred to in Respondent's "Second and Further Separate Affirmative Defense", Par. I of Board's Ans.) were not and are not policies or plans or methods or

techniques of intregation or desegregation or of correction of racial imblance. Open enrollment is at best, if otherwise valid, a design and tool therefor. None of Board's said policies was or is mandatory; they did not give rise to a "right" of transfer, but only to a "privilege" of transfer on the basis of "first come, first served"; they were not and are not equal as far as Board's minority pupils were and are concerned; they were not and are not designed to achieve, nor did they nor will they achieve, any objective related to intregation or desegregation or remedying racial imbalance or creating racial balance. No provision was made or is made for the free transportation of pupils from the "sending school" to the "receiving school". Respondent knew that its socio-economic disadvantaged pupils, the bulk of whom were and are minority pupils, could not avail themselves of any alleged privileges to transfer without transportation being made available to them without cost, by Board. The effect of Board's alleged "open enrollment"policies

was to permit White pupils attending schools with predominantly minority group enrollment to transfer to schools having predominantly white enrollment.

IV.49 That there is, in fact, no difference in terms of education, equal educational opportunity and educational discrimination, between de jure and de facto segregated schools. The harm inflicted on Negro and Mexican-American and other minority pupils, the denial of equal educational opportunity to such minority pupils, is the same in the so-called "de facto" segregated school as in the so-called "de jure" segregated school. Segregated education is inherently unequal and creates and inflicts the same harm, constitutes the same discrimination and deprives the student of the same equal educational opportunity, irrespective of the name by which it be called or categorized.

IV.50 That, throughout the entire of the time herein involved, from an educational standpoint, to achieve greater understanding, reduction of prejudice,

minimization of racial conflicts, a better and greater educational opportunity, it was and is sounder to integrate minority and majority children when they enter kindergarten or elementary school and give them an integrated education experience all the way through public schools rather than keeping minority children and majority children in segregated schools until they reach junior high or senior high school.

IV.51 On or about May 20, 1963, the Ad Hoc Committee of Board recommended to the full Board:

> "The committee recommends that the Board of Education adopt the following statement of policy:
>
> "The Board of Education believes that equality or opportunity in the total community for all ethnic groups is a desirable goal for our society. Therefore, the Board establishes a formal policy of providing equal educational opportunity for all pupils regardless of racial or socio-economic background, recognizing that equal opportunity is best achieved in schools which provide pupils an opportunity for interaction with persons of differing cultures and ethnic backgrounds.
>
> "In furtherance of this policy the Board recognizes an obligation to act positively within the framework of its educational

responsibilities, at all levels and in all areas of the school system,

> "a. By encouraging actions and programs designed to maintain in the Los Angeles City Schools a position of leadership in the avoidance of segregation or discrimination in such matters as school boundaries; student discipline; educational and vocational counseling; teacher placement, transfer, and promotion; and any other matter affecting equal educational opportunity.
>
> "b. By insuring that all such policies are continuously and clearly communicated to all school personnel and to the public."

On September 12, 1963, in the "Preface" to the Ad Hoc Committee Report to Board, the Ad Hoc Committee stated, in part:

> "The Board of Education reaffirmed its responsibility to provide equal educational opportunity to children of all races, religions and cultures on June 7, 1962 when it adopted the motion establishing the Ad Hoc Committee. The Board felt and feels that it has followed a policy directed toward the goal of equality in that the pupil-teacher ratio, basic curriculum, books per student, and transportation rules are equally applied throughout the District. It is conceded, however, that this formula falls far short of providing true equality for thousands of

> children who enter our schools from educationally and economically disadvantaged environments. They are in no way able to compete equally with children living under more favorable circumstances."

On or about December 21, 1967, Board by formal resolution, clarified its position with respect to said recommendation of the Ad Hoc Committee (quoted above in this IV.51), as follows:

> "Further, in order to clarify its position, [resolved] that the Los Angeles Board of Education accepts Directive No. 1 of the 1963 Ad Hoc Report as policy. In addition, the Board of Education sets as its goal an integrated system at all levels and divisions and instructs the staff to develop every feasible technique and program to accomplish this goal."

Notwithstanding the foregoing, Board did not take, and has not taken, any meaningful steps, and did not adopt and has not adopted and will not, unless commanded by the Court, take or do or adopt any plan or plans or any meaningful means or methods or mechanics or techniques or designs or tools to accomplish the stated or any integration goal, and

even to this date has not adopted any definition of "integration" or "desegregation" or "racial balance" or "racial imbalance".

IV.52 On February 13, 1969, the State Board of Education adopted its amended rules on ethnic balance in the schools, Section 2010 and 2011 (Title V, Calif. Admin. Code), to become effective March, 1969. Said amended Sections 2010 and 2011 read as follows:

> "2010. STATE BOARD POLICY. It is the declared policy of the State Board of Education that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall exert all effort to prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas and school attendance practices.
>
> "2011. SCHOOL DISTRICT AND STATE RESPONSIBILITIES IN PREVENTING AND ELIMINATING RACIAL AND ETHNIC IMBALANCE.
>
> "(a) SCHOOL SITES, ATTENDANCE AREAS AND ATTENDANCE PRACTICES. In carrying out the policy of Section 2010, consideration shall be given to factors such as the following:

"(1) A comparison of the numbers and percentages of pupils of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.

"(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.

"(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.

"(4) The effects on the racial and ethnic composition of each school and each grade of alternate plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.

"(b) RACIAL AND ETHNIC SURVEY. The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.

"(c) DETERMINATION OF RACIAL AND ETHNIC IMBALANCE AND CORRECTIVE PLANS. For purposes of these regulations, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs by more than 15 percentage points from that in all the schools of the district.

"A district shall study and consider possible alternative plans when the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the district-wide percentage. A district undertaking such a study may consider among feasibility factors the following:

"(1) Traditional factors used in site selection, boundary determination, and school organization by grade level.

"(2) The factors mentioned in subparagraph (a) hereof.

"(3) The high priority established in 2010.

"(4) The effect of such alternatives on the educational program."

Notwithstanding, on March 3, 1969, Board by formal resolution, adopted its Superintendent's

recommendations and interpretations of said amended Sections 2010 and 2011, to wit:

> " * * * The Superintendent therefore construes Sec. 2010 to mean that each school board shall seriously and earnestly engage in an 'effort to prevent and eliminate racial and ethnic imbalance' where feasible, and that prevention and elimination of such imbalance shall be one of the principal or primary goals of the district. The State Board did not say that the prevention and elimination of racial and ethnic imbalance shall be the first, and if necessary, the exclusive priority of each school district * * *
>
> "Inference may be made from Sec. 2011(a)(1) that the State Board regards a school to be in ideal or perfect racial and ethnic balance where the respective proportions of ethnic and racial groups in each grade of the school are precisely the same proportions that such racial and ethnic groups represent in the total school district pupil population. Sec. 2011(a), subsections 1 to 4, seem to require each district continually to strive, insofar a [sic] seems feasible, to achieve this ideal racial and ethnic balance. However, the Superintendent does not construe Sec. 2011(a) to require a school district to neglect its academic program in seeking to achieve such concept of ideal racial and ethnic balance * * *
>
> "The Superintendant further construes Secs. 2010 and 2011 to require the School District to racially and ethnically balance school populations, and ideally, grade populations within schools, where feasible.

> The extent to which the achievement of ethnic and racial balance is feasible is a decision legally committed to the Board of Education. The Board is to make its decision by weighing the feasibility factors specified in Sec. 2011(c), including the items set forth in subsections 1 - 4 in the manner there stated * * * "
>
> * * *
>
> "In summary, the Superintendent interprets these Rules to mean that the Board of Education is not required by Secs. 2010 and 2011 (as amended) to allocate its financial and other resources to the achievement of racial and ethnic balance if student academic achievement would likely suffer any significant decline because of any required reduction in the academic programs * * * "

Notwithstanding the foregoing, Board did not then or thereafter undertake or make any study, and has not formulated any plans, "for the relief and amelioration of racial and ethnic imbalance existing within some of the schools of the District". Approximately one year has elapsed since the adoption of said Resolution.

IV.53 After the adoption by Board of its Resolution of December 21, 1967, referred to in IV.51 above, the Court prepared (November 29, 1968), in

writing, "COURT'S UNDERSTANDING OF REPRESENTATIONS OF COUNSEL FOR RESPONDENT OF RESPONDENT'S INTENTION AND MEANING OF COURT'S EXHIBIT 5-C". Therein the Court stated its understanding of said Resolution as:

> "(1). That the Board 'recognizing that equal opportunity is best achieved in schools which provide pupils an opportunity for interaction with persons of different cultures and ethnic backgrounds' 'establishes a formal policy of providing equal educational opportunity for all pupils regardless of racial or socio-economic background' by and through 'an integrated system at all levels and divisions'.
>
> "(2). Therefore, the Board: 'recognizes an obligation to act positively within the framework of its educational responsibilities, at all levels and in all areas of the school system; adopts Directive 1 of the Ad Hoc Committee Report of 1963'; and 'instructs the staff to develop every feasible technique and program to accomplish this goal' of an 'integrated system at all levels and division'."

The Court requested confirmation by Board of the Court's understanding of said Resolution. Board did not make any reply thereto until May 1, 1969, on which

date it filed its memorandum entitled "RESPONDENT'S POSITION RE EQUAL EDUCATIONAL OPPORTUNITY AND DESEGREGATION". In said document, Board did not directly or unequivocally agree with the Court's construction of its said Resolution of December 21, 1967. It purported not to have an understanding of the phrase "equal educational opportunity". It conceived "of at least three different sets of conditions constituting school district activities that may be indicated by that phrase". Included therewith was: "(1) One such set might be that every pupil of the district is presented with precisely the same educational factors, both tangible and intangible, as every other pupil of the district * * *"; and, as to that, Board took the position "that there would be little point in seeking 'equal educational opportunity' according to the first set of conditions postulated". Incorporated herein, hereat, verbatim, is Board's said "RESPONDENT'S POSITION RE EQUAL EDUCATIONAL OPPORTUNITY AND DESEGREGATION".

IV.54 That, notwithstanding Board's said Resolutions, motions and directives, it is still committed to the policies, which are contrary to the duties specially imposed on it by law: That separate but equal is equal. That no affirmative duty exists on its part to seek and create integration. That neither under the Constitution of the United States or of the State of California nor the statutes of the United States or of California do minority students have any right to education in racially integrated schools. That, unless and until it is "clearly demonstrated that integration has a substantial effect on student achievement in a positive sense", and only when Board in its arbitrary and uncontrolled judgment decides that it has been so demonstrated, would it "put [its] money into integration".

IV.55 That Board will not, unless it is ordered to do so by the Court and supervised by the Court in the doing thereof, formulate and adopt, within any reasonable period of time, a bona fide Master Plan,

including the methods, manners, means, mechanics, designs, tools and techniques, for the consummation thereof, for the integration of its schools.

IV.56 Board's unwillingness and refusal to racially integrate its schools, unless compelled to do so by order of the Court, is based, in part, on fears and genetic assumptions: That the costs of integration, which costs it does not know, will financially compel a reduction in the educational inputs to, and therefore the outputs of, the majority. That integration will reduce the motivation and therefore the achievement of the majority group pupils and reduce the average learning capacility of such pupils to the assumed lesser learning capability of the pupils of the minority groups.

The Court finds that the Board's fears and assumptions are not founded in fact and are not true.

IV.57 That Board has also created and maintained and perpetuated, and does and will continue, unless commanded otherwise by the Court, to create and

maintain and perpetuate, segregated schools and a segregated school system in the hope of the happening of voluntary education integration.

The Court finds that said hopes were not and are not founded in fact. There was not and is not any racial or social basis therefor.

IV.58 That Board knew, actually and constructively, that no state statutes or rules or regulations of the State Board of Education provided for or allowed segregated schools or required or allowed such adherence to the neighborhood school concept as would create, maintain or perpetuate segregated schools.

IV.59 Board made no racial census or survey of the pupil population in its schools until 1966 when directed to do so by the State Board of Education. Prior thereto, it collected ethnic data only on a spot check geographic basis conducted on automobile "drive throughs". Board knew or should have known that it could not comply with its constitutional and statutory duties without a school-by-school racial and ethnic

census or survey. Board had been requested, commencing in or about 1962, to collect and collate such data. Board knew or should have known, upon the original adoption by the State Board of Education of its Rule 2010 (i.e., Section 2010 of Title V of Administrative Code) in 1962, that it could not comply therewith without the collection and collation of such racial and ethnic data.

IV.60 That eighteen school sites were acquired and new schools were built and completed thereon between May 1963 and January 1968. Prior to the acquisition of the sites and the building of the schools, no consideration was given by Board or its Staff to alternate sites which would have had any substantial or material effect upon racial balance. The new school sites selected and schools built and opened since 1963 were not selected to, or built or opened for, nor did they, achieve or further integration in the schools of the District. To this date, Board has not promulgated any definitions of "integration", "segregation",

"desegregation", "racial balance", "racial imbalance", or instructed its Staff with respect thereto in connection with the selection of new school sites. By reason thereof, Board's Staff were unable to, and did not, select sites for new schools or establish or readjust attendance boundaries to achieve or further integration.

IV.61 That Board did not give any instructions to its Staff to consider, in connection with changing attendance areas and boundaries, the pairing of schools or consolidation of attendance areas or any other designs or tools or methods or techniques of integration, in order to facilitate or create integration.

That Board and its Staff, in selecting, approving and resolving upon the creation or changing of attendance districts and boundaries, did not have any written racial or ethnic data before them with respect to approximately seventy-five per cent of the attendance area boundary decisions made since May, 1963, and with respect to the remaining decisions did

not have sufficient information upon which a well-considered integration decision could have been predicated.

IV.62 That Board has, to the present time, knowingly and intentionally, omitted, failed and refused to define or instruct its Staff as to what it intended by the term "integration" or "racial balance" or "racial imbalance" or "equal educational opportunity".

It was not until on or about August 2, 1966, that Board's Staff had under consideration an experimental approach to integrated education, as distinguished from a comprehensive plan for mandatory integration.

IV.63 That, since 1963, Board has collected and spent billions of dollars in public money without affirmatively, actively or effectively seeking or achieving or attempting to achieve racial integration in any of its schools; whatever integration exists was and is fortuitous, i.e., resulted from neighborhood population changes. The public monies have, in effect,

been expended to maintain and thereby to perpetuate the segregation existing in Board's schools, without any meaningful progress toward integration. Board rationalized its failure and omission so to do by its assertions as hereinabove found. Board's directives and statements, sounding as if Board were, in fact, seeking and ordering integration, were solely issued for public relations to attempt to keep the minorities pacified by attempting to create an image of equal educational opportunity.

IV.64 That Board has not, since May, 1963, evolved or adopted or put into motion or maintained any effective integration program.

IV.65 On March 12, 1970, the State Board of Education repealed Sections 2010 and 2011 of Title V of the California Administrative Code, in their entirety, without first having complied with the notice and publication procedures specified in Section 11423 of the Government Code of the State of California.

In connection with the adoption of the resolution by which the State Board of Education repealed said regulations, the State Board of Education made the following "Finding of Emergency" under Government Code Section 11421(b):

> "The State Board of Education finds that an emergency exists and that the foregoing regulations are necessary for the immediate preservation of the public peace, health and safety or general welfare. A statement of the facts, constituting such emergency is:
>
> "These regulations have been cited in past and pending litigation in support of mass transportation of pupils from one attendance center area to another. It is necessary that the Board's disfavor of this practice be known immediately.
>
> "These regulations are therefore adopted as emergency regulations to take effect immediately upon filing in accordance with Section 11422(c) of the Government Code."

IV.66 The allegations of Paragraphs 1; 2; 3; 4; 6; 7; 8; 9; 10; 11; 12; Lines 14-18, p. 5, of Pet., of 13; 15; 16; 17; 18 and 19 of Pet.

IV.67 The allegations of Paragraph 20 of Pet. (added by Amm. to Pet., Par. 1 thereof, filed June 11, 1969).

IV.68 That to and only to the extent that funds are granted to Board by the Federal Government or the State of California, but not otherwise, Board has established and is operation (sic) compensatory educational programs for "its educationally or culturally deprived students, most of whom are from a racial minority group". (Lines 13-14, p. 2, of Ans.)

IV.69 That compensatory educational programs are methods which, at substantial cost, attempt to alleviate educational and cultural deficits suffered principally and substantially by the Negro and Mexican-American pupils who have, are and will continue to be required by Board to attend segregated and racially imbalanced schools, by reason of the failure and omission by Board to provide to them equal educational opportunity by and through integrated schools.

IV.70 That Board has "historically * * * selected its school sites and has built its plants as close as financially possible to the center of the area in which the pupils live" (Lines 30-32, p. 2, of Ans.), i.e., neighborhood schools, without reference to integration and without regard to the effect of segregated education. That school sites have been and are being selected and said school plants constructed thereon and thereafter maintained within known segregated areas or areas which Board knew or should have known in the exercise of reasonable care and skill would be segregated within a short period of time. Attendance area zones have been and are selected without regard to the integration of Board's schools. "[A]ttendance area zones surrounding such school plants are based upon capacity of the school, safety and hazard factors, distance to be traveled between home and school, natural, geographic or other physical barriers" (Lines 9-12, p. 3, of Ans.), without regard to integration or the educational effects thereof, segregation or the

educational effects thereof, or the rights to equal educational opportunity. The sites were and are selected, the schools were and are being built, although Board knew or should have known, in advance, that the student bodies in said schools would be and are segregated, i.e., all or substantially all minority or all or substantially all white.

IV.71 The filing of the Petition for Writ of Mandamus in behalf of all of the pupils of Board similarly situated to Petitioners, and the prosecution of this proceeding, an involved and difficult one, required capable, experienced and diligent Counsel. It was made necessary by Board's omissions, failure and refusal to perform duties specially imposed by law, to wit, to provide to all of the pupils attending its schools, irrespective of race, color or creed, economic or social circumstances, equal protection of the laws, due process of law, equal educational opportunity, by taking such action and doing such things and otherwise

as may be reasonably necessary to reconstitute its schools as a racially unitary school system.

IV.72 Petitioners are nominal petitioners who sue in behalf of all pupils of Board similarly situated. Petitioners cannot and should not be expected to finance, from their own resources, this cause. The research of the facts and law, the assembling of evidence, the preparation of briefs, the selecting, interviewing and procuring of Experts to testify, the taking of depositions and the trial iteself required the expenditure of vast amounts of time by Counsel for Petitioners.

To pay the reasonable value of Counsel's services is only within the financial ability of the rich. Petitioners are not of that class.

It was therefore necessary for Petitioners to procure experienced and able Counsel, legally and philosophically in accord, economically able to take the risk, and willing to devote the time and effort reasonably required, to do all thereof, upon a

contingency as to their compensation, that is, if successful, for such sum, if any, as the Court might allow.

IV.73 This is an equitable proceeding, having for its objective the compelling of Board to perform the duties specially imposed upon it by law. Without the undertaking of this cause by Counsel, and if this Court be not allowed by law to award reasonable compensation thereto, Petitioners and all others of the class for whose benefit this proceeding was filed and prosecuted would have no plain, speedy or adequate redress against Board's conduct and to compel it to perform its duties specially imposed by law.

It is necessary in our system of government that the governed be allowed to seek out, find and have represent them capable, experienced Counsel, willing to undertake a just cause upon a contingency as to their compensation, i.e. such reasonable amount as the Court may allow to them for their services, if successful.

IV.74 That all of the pupils, Whites, Orientals, Negroes and Mexican-Americans, of Board will benefit by integrated living and experience in integrated schools, learning that race, color, creed, economic and social circumstances or station in life do not make anyone more or less than a human being. Integrated education will tend to teach all of the pupils to lose their fears of different races, their prejudices, their bias, their bigotry, to seek and do Justice, to walk humbly with their fellow beings, to love mercy, to temper righteousness with mercy, and to allow every person their right to worship as they will. The parents, in participating in integrated educational processes, will also so learn. Board will learn of the benefit to all of its pupils by and from integrated education and will, hopefully, lose its assumption of inferiority of one race when compared with another.

IV.75 That the right of Counsel to reasonable compensation should not be restricted or inhibited by a doctrine which limits the compensation of services of

Counsel to causes which provide monetary recovery. The protection and preservation of the inalienable constitutional rights of any class of citizens, the enforcement of duties of government, imposed upon it by law, to its citizens, is at least as valuable, if not more so, than the recovery by litigation of money. Rights, particularly the inalienable constitutional rights, are a species of property. In a country of laws, the reaffirming, enforcement and preserving thereof, including the most sacred and invaluable of the rights, the right to life, liberty and the pursuit of happiness, to be a human being, for every person to receive the same equal protection of our laws, is one of the highest callings of Counsel; and when done in behalf of those otherwise unable to do so, the disadvantaged, Justice requires, demands, that they receive reasonable compensation therefor.

IV.76 That, by causing Board to perform the duties specially imposed on it by law, this action provides substantial benefit to a large number of its

pupils, i.e., the minority group pupils, raises the standard of Board's fiduciary duty to all of its pupils and thereby serves important considerations of public policy.

If the Court does not have, or is denied, the power and right to allow reasonable compensation for the services of Counsel in causes like this, and particularly when they skillfully, efficiently and effectively re-establish the rights of the class in whose behalf the action was brought, the bringing of such actions would be discouraged instead of, as should be the case, encouraged.

IV.77 That Board allocated a substantial sum to defend this case. It had at its command able and experienced Counsel and made available to its Counsel the abilities, education and skill of its Staff, the very persons enjoined by law to render and perform the duties sought to be enforced by Petitioners. But for this proceeding, Board would not have performed the duties specially imposed upon it by law to grant to all

of its pupils an integrated, equal educational opportunity; to this day, Board denies that it has such duties.

IV.78 The Court retains jurisdiction to allow to Counsel for Petitioners reasonable compensation for their services on appeal and such other additional services which may be reasonably required to be rendered in any subsequent proceedings in this cause.

IV.79 That, by reason of all of the facts hereinabove and hereinafter found to be true and not true, Board, in its denial to Petitioners, and the class in whose behalf the Petition was filed, of equal educational opportunity by integrated education, has been and is guilty of bad faith.

IV.80 That Board had and has a duty, in all matters relating to the education of its students, to act in the highest of good faith. It thereby denied to its pupils that which was and is justly owing to them.

IV.81 That Board is a Trustee. That it could have, and in the highest ideals of a trustee and with the

complete impartiality owed to all of its beneficiaries, should have, filed its own action or cross-complaint for declaratory relief to have the Court adjudicate its rights, duties and obligations to and among all of its pupils; assuming an impartial position, it could have introduced all of the evidence available to it, and being willing, even desirous, of performing the duties imposed by law upon it, asked the Court for a declaration thereof. Instead, it defended against the Petition and denied its duties specially imposed upon it by law, sought by this cause to be performed. Its defense was strenuous, capable and hard.

That Board would not have performed the duties specially imposed upon it by law to grant to all of its pupils integrated, equal, educational opportunity but for this proceeding. To this very day, Board denies any such duties.

IV.82 That it is therefore reasonable, just, within the concepts of equity, the administration and preservation of Justice, and required by the conscience

of the Court, that Counsel be allowed reasonable compensation to be paid by Board.

Board has announced that it will take an appeal from the Judgment herein. Counsel for Petitioners shall be entitled to reasonable compensation for their services to be rendered on such appeal. It is therefore proper that the Court retain jurisdiction to, in the event of and upon entry of the final Judgment herein, allow to Counsel such additional compensation as may be just and reasonable under all of the circumstances for their services on such appeal.

IV.83 That the reasonable value of the services of Counsel for Petitioners, for the instituting and prosecuting of this cause to the date hereof and hereafter, the preparation of the formal Findings of Fact, Conclusions of Law, Judgment and Peremptory Writ of Mandamus, the settlement thereof, and the defense of Board's Motion for New Trial, if any be made, is the sum of $65,000.00, plus Petitioners' costs and disbursements herein.

IV.84 That Board will only meaningfully adopt, in good faith, integrated education, a wholly unitary system of schools, as its aim, purpose and goal, with all due diligence and speed, and will only evolve and adopt a Master Plan of and for integration, together with the manner, means, mechanics, designs, tools and techniques for the carrying out thereof; a plan, method, means, mechanics, designs, tools and techniques which will effectuate integration in Board's schools within a reasonable period of time; when commanded by this Court to do so.

That to attempt to assure the doing thereof in good faith and with all the diligence and speed, having in mind the long period of time already elapsed, upon completion and adoption by Board of said Master Plan and of the methods, means, mechanics, designs, tools and techniques for the consummation thereof, it should be required to submit all thereof to this Court for its approval as conforming to law and the Peremptory Writ of Mandamus to be issued.

IV.85 That the Court will require the assistance of an Expert or Experts to ensure the performance by the Board of its duties hereunder and under the Peremptory Writ of Mandate to be issued by the Court, and to assist the Court upon the review of any such Master Plan, and the manner, means, methods, mechanics, designs, tools and techniques for the fulfillment thereof, which shall be submitted to the Court by Board.

The Court's Expert or Experts shall be required to audit the proceedings of Board and to be of such assistance to it as may be within his or their power to enable Board to conform to the Judgment and Writ of the Court and the duties imposed by law on Board.

IV.86 That the appointment of such Expert or Experts will facilitate and ensure compliance by Board with the Judgment and Writ of this Court, in good faith and with all due diligence and speed; the appointment of such Expert or Experts to assist the Court is essential in view of the long period of time

already elapsed during which Board has knowingly and deliberately failed and omitted to perform the duties imposed upon it by law.

IV.87 It is just and necessary that reasonable compensation be paid to the Court's Expert or Experts, as may be fixed and allowed by the Court; and that such compensation shall be paid by Board.

The Court therefore retains jurisdiction to, upon motion of either of the parties or upon the Court's own motion, appoint such Expert or Experts and to allow reasonable compensation thereto for his or their said services. The provisions of Chapter 3, Article 1, Article 2, §§720-733, of the Evidence Code shall be applicable thereto.

IV.88 That Board and Staff knew, or should have in the exercise of reasonable care, skill and knowledge known, and know or should know all of the facts found by the Court to be true and not true.

V. The Court finds not true:

V.1 That the offering and extending of equal educational opportunity to all by integrated schools would reduce either the educational "inputs" or "outputs" or motivation or achievement of the White pupils or that it would require Board to withhold from them any academic offerings.

V.2 That the educational abilities of the Negroes and Mexican-Americans are inherently or genetically inferior to the Whites. Board's said position is based upon an erroneous assumption, to wit, that the educational opportunities made available by it in the minority segregated schools are in fact equal to those offered in the white school.

V.3 That "Respondent is as committed as Petitioners appear to be to the integration of the schools."

V.4 That Board is making, has made and will continue to make every or any feasible effort or has been or is seeking or will seek every or any feasible

means toward or to effect the integration of its schools or school systems.

The Court finds true that Board will only do so when commanded by the Court.

V.5 That Board's basic policy has been, when confronted with two or more educationally sound courses of action, to select that course of action which is most likely to lead to school integration.

V.6 That the Federal Constitution only requires integrated education, i.e., racial mixing in the schools, if and only if the segregation, i.e., racial separation of students in the schools, is of a de jure nature, and if and only if in the case of de facto segregation, the academic achievement of the minorities in the schools will be raised by racially mixing students and the achievement of the majority will not be substantially reduced ny such racial mixing.

The Court finds true: That the academic achievement of the minorities in the schools has been, is and will be materially and adversely affected and

reduced when compelled, either de jure or de facto, to attend minority segregated schools. That the academic achievement of the minorities in the schools will be materially and beneficialiy affected and raised by integrated education. That the academic achievement of the majority, i.e., the white pupils will not be substantially or materially or at all adversely affected or reduced by integrated education.

V.7 That, under the duties specially imposed upon it by law, Board is only obligated to provide to all students a minimum educational offering in such amount and quality that the average achievement of the allegedly racially higher achieving group, i.e., the segregated white pupils, will not substantially decline; and then and only then Board should provide to racial minorities, to the extent that it has the financial wherewithal, educational offerings in addition to the basic minimum offering to attempt to close the gap between the average achievement of white pupils and that of the racial minorities.

V.8 That Board has any right or choice to create or maintain or perpetuate substantial allegedly de facto segregation because, in its alleged opinion, "a higher level of student achievement" will result than under integrated education.

The Court finds true: That, until commanded otherwise by the Court, Board has, does and will continue to create, and maintain and perpetuate, and has, does and will continue to maintain and perpetuate, existing minority segregated schools and white segregated schools under the claim and alleged justification that, notwithstanding the affirmative acts and knowing and intentional omissions on the part of Board, as hereinbefore found, such schools are de facto segregated.

V.9 That the integration of Board's schools will significantly or substantially reduce the funds available for the education of its pupils.

V.10 That Board has not had available to it any hard data indicating that classroom education as it is

commonly understood will be enhanced through integration.

V.11 That the racial imbalance and segregation existent in Board's schools since 1963 and thereafter is fortuitous, i.e., is de facto and not de jure.

V.12 That the educational ability or educational output of white pupils will be adversely affected by integrated education.

The Court finds true: That integrated education, whether it be as defined and provided by the Rules of the State Board of Education or under the finding, and the Court finds true: (i) that integrated education requires not less than ten per cent nor more than approximately forty-nine per cent of minorities, the residue being White; or (ii) by racially balanced schools, that is, wherein the percentage of minorities and whites in each school approximates the racial composition in Board's entire district; will substantially and materially benefit the education, both input and output, of the White and minority students.

V.13 That Board has not integrated or racially balanced its schools during the past years because it lacked or lacks funds to do so. That it could not have integrated or racially balanced its schools without sacrificing the academic achievement of its White pupils or any of its pupils.

V.14 That integration would require massive expenditure of funds or that the costs thereof can only be created by substantial reductions in the educational processes or programs of Board.

The Court does find true: That, upon the trial of this cause, Board conceded and agreed that it did not claim impossibility of performance of, or financial inability or frustration preventing it from, integrating its schools if a duty so to do is specially imposed upon it by law. That when and only when Board evolves and adopts a Master Plan of Integration, together with the manner, means, methods, mechanics, designs, tools and techniques of and for the putting into effect and carrying out such Master Plan, and, as a part thereof,

makes a thorough, unprejudicial study and thereby a determination of the costs thereof, that is, the costs of the manner, means, methods, mechanics, designs, tools and techniques of putting said Master Plan into effect, none of which Board has done to the date hereof, will it then know with reasonable certainty the costs thereof.

V.15 The affirmative allegations of Paragraph IV of Board's Ans., excepting only that the Court finds true: That, to and only to the extent that Board receives grants, federal and state, therefor, does it establish and operate compensatory educational programs "for its educationally or culturally deprived students, most of whom are from a racial minority group". That compensatory education does not provide the most important determinant of academic achievement for minority pupils. It merely endeavors to help the minority child overcome the learning and knowledge defects caused by and to adjust to the

societal arrangement that created his problem in the first place, i.e., segregation and segregated schools.

V.16 The affirmative allegations of Paragraph V of Board's Ans.; excepting only that the Court finds true: "that historically it [Board] has selected its school sites and has built its school plants as close as financially possible to the center of the area in which the pupils live", even though Board thereby created or maintained and perpetuated segregated schools; and "that the attendance area zones surrounding such school plants are based upon capacity of the school, safety and hazard factors, distance to be traveled between home and school, natural, geographic or other physical barriers", without regard to integration and without regard to the effect upon equal educational opportunity of the students thereof by virtue of said schools being, or becoming within a relatively short period of time, segregated schools.

V.17 The affirmative allegations of Paragraph VI of Board's Ans.; excepting only that the Court finds

true: that Board has had and does have policies of "issuing permits to pupils authorizing them to attend schools other than the school serving the area of their residence whenever there is unused capacity in such other schools", but that policies did not and do not provide transportation for disadvantaged children, did not and do not educate the parents of minority students of the existence and benefits to be derived therefrom, were on a first-come, first-issued basis, and the alleged unused capacity was minimal, so that, in practice and effect, said policies inured only to the benefit of the White students seeking to get out of and thereby enabled to transfer out of a segregated or racially imbalanced, predominantly minority school into a white school.

V.18 The affirmative allegations of Paragraph VII of Board's Ans.

V.19 The affirmative allegations of Paragraph VIII of Board's Ans.

The Court finds true:

(i) That the Bill of Rights, the Fifth and Fourteenth Amendments of the Constitution of the United States, Article I, Section 11, Article IX, Section 1, of the California Constitution, and Sections 2010 and 2011 of Title V of the Administrative Code of the State of California (promulgated by the State Board of Education), as they were in effect at the time of the trial of this proceeding, required and, excepting only said Sections 2010 and 2011 now allegedly repealed, require Board to grant to all of its pupils equal educational opportunity; and

(ii) That equal educational opportunity can only exist in integrated schools; and

(iii) That to perform the said duty specially imposed upon it by law Board has the power to, and is obligated to, in order to provide equal educational opportunity to all of its pupils, compel them to attend certain schools to be designated by it, because of their race or color and to deny pupils the right to attend

schools selected by them or their parents solely because of their race or color; and

(iv) That Board stands in loco parentis to its pupils and is mandated by law not to do or omit to do, directly or indirectly, anything which will or may prohibit or impede their said pupils from receiving, and to render to them, equal educational opportunities. Duties specially imposed by law confer all powers reasonably necessary for the performance thereof; and

(v) That a pupil has no right to select and determine the particular public school which he shall attend; and

(vi) That, since and only since 1966 when the Board was mandated by State Board so to do, it has made a compilation or survey of the ethnic compositions of its schools; and

(vii) That the schools under the jurisdiction of Board are approximately 555 in number (elementary, junior high, senior high schools), Board no longer having jurisdiction over junior colleges. That the

area served by Board is approximately 711 square miles. That Board's pupils number approximately 648,000.

V.20 The allegations of Paragraph IX of Board's Ans.; excepting only that the Court finds true: that Board has established a few small and insignificant pilot integration programs, but did not make any in-depth analysis thereof so as to be enabled to determine the effect thereof. That said programs were not, in fact, programs or studies of integration, in that Board has never formulated or adopted any definition of "integration" or plan or plans therefor.

VI. The Court makes no findings upon:

VI.1 The allegations, beginning with the word, "Among", in Line 24, p. 5, to Line 4, p. 6, a part of Paragraph 14 of Pet. The Court finds true the allegations of said Paragraph 14 that Board "at all times material hereto has failed to take reasonable steps to alleviate and eliminate racially segregated conditions in the public schools within the District".

The Court herein adjudging Board's duties specially imposed upon it by law and ordering the issuance of a Peremptory Writ of Mandate directed to Board, ordering it to, in good faith and with all reasonable and due diligence, evolve and adopt a Master Plan, together with methods, means, manner, mechanics, designs, tools and techniques for the carrying out thereof, having for its objective and purpose the integration of all of its schools, and thereupon to present it to the Court for its approval as fulfilling said Writ and the duties specially imposed upon it by law, the Court does not, in advance make any findings thereon, thereby allowing Board the widest possible latitude therefor, excepting only that said Master Plan shall be applicable to the entire of Board's District. Board is and should be allowed, in good faith, to evolve, evaluate and thereupon adopt the best and most expeditious Master Plan for the integration of the schools of its District and the modes, means, manners, steps, mechanics, designs, tools and

techniques for the implementation of said Master Plan which will work. Board will have the burden, upon the return of said Master Plan to and hearings before this Court, to show that said Master Plan will work and will achieve such integration.

VI.2 The Court makes no finding at this time, whether, as Board has argued, if integrated education be imposed within its entire District, whites will flee therefrom. The Court does however conclude as a matter of law that the "fleeing of the whites", if it should occur, cannot and does not and will not justify segregated education or the denial by Board to all of its pupils of equal educational opportunity by and through integrated education. Whites are not to be induced to or caused to remain within Board's District by Board depriving its minority pupils of their constitutional, inalienable rights. Neither does white racism or minority racism excuse or justify Board's non-compliance with the duties specially imposed by law upon it.

VII. In the event that any of the following Conclusions of Law are claimed or held to be Findings of Fact, they are by reference incorporated herein, hereat, verbatim.

As Conclusions of Law from the foregoing Findings of Fact

CONCLUSIONS OF LAW

I. In the event that any of the foregoing Findings of Fact are claimed or held to be Conclusions of Law, they are by reference incorporated herein, hereat, verbatim.

II. That Petitioners and the class in whose behalf this proceeding was instituted and prosecuted did not have and do not have any plain or speedy or adequate remedy at law. Their only remedy is this proceeding for Writ of Mandate to compel performance by Board of the duty specially imposed by law upon it.

III. There is a legal right on the part of all of the children of District to equal educational opportunity in its schools. The duty to provide such right has been by

law specially imposed upon State and, through it, upon District and Board as District's governing body.

IV. The right to equal educational opportunity is an inalienable right, within the Bill of Rights, the Fifth and Fourteenth Amendments of the United States Constitution, Article I, Sections 1, 3 and 13, and Article IX of the California Constitution, Rule 2010, as now and hereafter providing, of Title V of the California Administrative Code, the Rules of the State Board of Education. The right of all pupils, Grades K through 12, being involved herein, to attend school and to receive the opportunity to acquire an equal education equal to the educational opportunity offered to all other pupils, irrespective of race, color, creed, economic or social circumstances, is a fundamental right, a legal right, a species of property, equal to, if not greater than, other tangible property rights, it being the right to be a human being, and said right requires that they receive said opportunity in integrated schools.

V. That the following facts have heretofore been judicially adjudged as existing, and the following principles and holdings of law adjudicated. The Court and the parties hereto are bound thereby:

(i) (Brown v. Board of Education of Topeka (Brown I) (May 17, 1954), 347 U.S. 483, 74 Supreme Court 686, 98 L. ed. 873, 880-88)

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> * * *
>
> "Does segregation of children in public schools solely on the basis of race, even

though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities? We believe that it does.

"In Sweatt v. Painter, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court granted relief in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In McLaurin v. Oklahoma State Regents, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations; '* * * his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> 'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually

> interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Degregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'
>
> "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. * * *
>
> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiff's and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." (347 U.S. 493-495.)

(ii) (J. R. Jackson, Jr., et al. v. Pasadena City School District, et al. [Jackson] (June 27, 1963), 59 Cal.2d 876, 880-81.)

> "The segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal

opportunities for education and denies them equal protection and due process of law. [Citations.] In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis. Because of intangible considerations relating to the ability to learn and exchange views with other students, segregated professional schools have been held not to provide equal educational opportunities, and such considerations apply with added force to children in grade and high schools. The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and their mental development. [Citations.] * * * Improper discrimination may exist notwithstanding attendance by some white children at a predominantly Negro school or attendance by some Negro children at a predominantly white school. * * * A racial imbalance may be created or intensified in a particular school not only by requiring Negroes to attend it but also by providing different schools for white students who, because of the proximity or convenience, would be required to attend it if boundaries were fixed on a non-racial basis. * * * Even in the absence of gerrymandering or other affirmative discriminatory conduct by a school board, a student under some circumstances would be entitled to relief where, by reason of residential segregation, substantial racial imbalance exists in his school. So long as large numbers of Negroes live in segregated areas, school authorities

> will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause." (59 Cal.2d at 880-81.)

(iii) (United States of America, et al. v. Jefferson County Board of Education, et al. (March 29, 1967), 380 F.2d 385; Cert. denied October 9, 1967; 88 Supreme Court 72, 77.)

> "If Negroes are ever to enter the mainstream of American life, as school children they must have equal educational opportunities with white children." (380 F.2d at 389.)

VI. The right to education existing, the duty was and is imposed upon Board to provide such education

within its District. Such duty to provide education, and the right of all pupils thereto, prohibits Board from creating or maintaining and perpetuating separate but allegedly equal facilities, and includes the right to, and the duty on Board to provide to all of its pupils, equal educational opportunity which is a concommitant of equal protection of the law and due process of law. Separate education, with allegedly separate but equal facilities, is not equal education. Therefore, Board has had the duty, has the duty and will continue to have the duty to provide integrated education so that all of its pupils—White, Negro, Mexican-American and Oriental—receive together the same educational opportunity. The duty of Board in this connection is affirmative, not negative.

VII. The Fourteenth Amendment to the Constitution of the United States imposes a duty on the part of Board, as an agency and instrumentality of this State, Board's acts and omissions being the acts and omissions of State, that when any action was, is or will be

undertaken by Board, it must conform to and confer equal protection of the laws, due process of law and equal educational opportunity. Board's action and omissions need not be the sole cause of the denial of equal protection of the laws or due process of law to constitute a breach by Board of its duties specially imposed by law. The duties specially imposed upon Board by law are breached when discrimination results at least in part from its actions which are to some significant extent involved.

Action on the part of Board, and therefore State action, was, is and will be significantly involved in the discrimination existent within Board's segregated schools and segregated education, so as to fall within the prohibitions of the Fifth and Fourteenth Amendments to the Federal Constitution, because, among other actions:

(i) The State having undertaken through School Districts and Board, as the governing body of the District herein involved, to provide educational

facilities to the youth of the State, Board was and is and will continue to be required to do so in a manner which avoided, avoids and will avoid segregation and unreasonable racial imbalance in its schools; and

(ii) Board lent and is lending its power and authority, its finances and processes, to create, maintain and perpetuate segregated schools and segregated education. Its actions have, are and will continue to discourage integration. It instigated, instigates, encouraged and encourages segregation even though such goal may not have been within Board's stated purposes. Though Board action took many forms, the test is not the form taken but rather the ultimate result which was, is and will be achieved through and by its powers, authority, finances and processes. Discrimination having been, being and continuing to be thus accomplished, the nature of Board's said actions is not limited by the ingenuity of those who would seek to conceal it by subtelties and claims of neutrality; and

(iii) Board has expended, is and will continue to expend billions of dollars of public monies for the creating, protecting, maintaining and perpetuating of its segregated schools, selecting and purchasing sites and building schools in segregated neighborhoods, knowing that such schools would be or become, upon their opening or within a short period of time thereafter, segregated or racially imbalanced; and

(iv) Board set, sets and will continue to set attendance boundaries and mandated school attendance by minority pupils and thereby compelled them to attend minority segregated schools, thereby discouraging and impeding or preventing and prohibiting them from attending white or substantially all-white schools; and

(v) Board, by its admitted conduct in providing "* * * to all students a minimum educational offering in such amount and quality that the average achievement of the racially higher achieving group will not substantially decline", discriminated against

minority pupils in favor of White pupils; such action perpetuated the disparity existing, which Board caused to exist and will continue to exist because of its segregated schools; and

(vi) The segregation in Board's schools, both white segregated and minority segregated schools, was not and is not de facto. It was and is de jure.

The labeling of segregation as de jure or de facto does not change the fact of segregation. Each is merely a legal designation, a legal handle in the formulation of duties. The duty to grant and give to all pupils, including the minority pupils, equal educational opportunity, is affirmative, the counterpart of depriving by prohibiting.

The Fifth and Fourteenth Amendments prohibited the denial of the rights thereof and imposed a duty on Board, at the very least, not to do anything, directly or indirectly, by any manner or means or omissions, to perpetuate the withholding of the rights, a duty not to do anything, directly or indirectly, by any manner or

means or omissions, which in fact educationally discriminated against the right, a duty to in no manner or by any means aid in the deprivation of the right; and

(vii) Board denied free transportation to socio-economically disadvantaged minority pupils, attending and compelled by Board to attend segregated schools, to enable them to attend another school outside of their mandated neighborhood, thereby discouraging and impeding or preventing and prohibiting them from attending white or substantially all-white schools.

The doing by Board of, among others, said acts and activities constituted, factually as well as legally, the impeding, discouraging and preventing of the exercise of constitutional rights by its pupils and was, therefore, the establishment of de jure segregated education.

It is virtually impossible, in the creation and maintenance of neighborhood schools and the mandating of pupil attendance thereat, which schools

are in fact segregated, to have only so-called de facto segregation; said were and are created, and maintained and perpetuated, by public monies, i.e., derived from taxes imposed on the public. Segregation in public education is not reasonably related to any proper governmental objective.

VIII. The issue herein is not a social issue, not a technicality, but one of constitutional rights, whether in education separate but allegedly equal is equal. Board has great discretionary powers in determining the curriculum, the mode and manner of teaching, establishing and maintaining the public schools and the educational processes; and the Court will not impose its judgments thereon. But Board is a Trustee, a fiduciary, to all of its pupils, and owes to each of them a duty, in the highest of good faith, not to discriminate but rather to give and make available to all equal educational opportunity, not to give to one that which it denies or withholds from another, but equally, without favoritism, without preconceived assumptions

of superior or inferior educational capabilities, without segregation, whether by reason of race or color or creed or economic or social circumstances.

IX. Board's position that "the school district should compare the educational effects of a given number of dollars spent on one input with the educational effects of the same number of dollars spent upon another school input", in deciding whether it will integrate education, overlooks its duty to all of its said pupils. The duty cannot be performed by favoring one race over another because of Board's belief, assumed, that minorities inherently are less educable. There can only be a true comparison of the effect of expenditure of a given number of dollars spent on one input with educational effects of the same number of spent on another input when all pupils have first had, and for a reasonable period of time sufficient to overcome the detrimental effects of the discrimination heretofore suffered by them, equal educational opportunity, so that when funds are spent

on a particular input that input will be provided to all pupils who will have the benefits of the same equal educational opportunity.

X. Nothing herein is intended to, nor shall it, prevent Board from expending any surplus funds, surplus after having first created equal educational opportunity, for special programs for all gifted children and other forms of higher educational processes.

XI. Board, as an agency and instrumentality of the State, is bound by and must comply with the State Board's determinations and definitions respecting integrated education, and its Rules thereon, as long as such determinations, definitions and Rules comply with Board's pupils' constitutional rights.

Neither the United States Constitution nor the California Constitution nor any of the provisions of the California Education Code nor any of the decisions of the United States Supreme Court or of the Appellate Courts of this State specifically define "integration",

"segregation", "racial balance" or "racial imbalance". During the course of the trial of this cause, State Board adopted, pursuant to the power vested in it by the Education Code of the State of California, its amended Rules 2010 and 2011 (Sections 2010 and 2011 of Title V of the Administrative Code); said Rules, in effect, defined a racially imbalanced school and, by necessary implication, a racially balanced school. Because said Rules had the force and effect of statutory law, the Court, in its "Minute Order of Court's Intended Findings of Fact, Conclusions of Law, Judgment and for Peremptory Writ of Mandate" (filed February 11, 1970) [Minute Order], construed them and held that as so construed they were and are binding on the Court and on the parties. The Court held and holds that: State Board does and must have the power to promulgate Rules, defining and ordering integration, desegregation and racial balance, within all of the public schools of State, by and through its Districts, which Rules will bind District and Board; for,

otherwise, there could possibly be as many definitions and rules of integrated education, racial balance and imbalance as there are Districts within the State. The rules and definitions of integration, segregation, racial balance and imbalance must be uniform throughout the State, for it is State action. State Board has failed, by reason of its alleged repeal and revocation of its aforefound Rules 2010 and 2011, to define and provide for integrated education throughout the State. Therefore, the Court has the jurisdiction and power to define and command integrated education within District. When, as and if State Board shall, upon the notice and procedure provided by State law, duly and regularly adopt Rules defining and providing for integration of and integrated education in all of the public schools within all of its school Districts, such Rules, conforming to law, will supersede the definition of integration and integrated education herein found and adjudged; and in that event this Court's jurisdiction will become restricted and proscribed by

Government Code Section 11440 as presently existing and hereafter modified or amended. An administrative remedy being provided thereby, it is required to be first exhausted by the parties.

IX.A. Subsequent to the Court's Minute Order of February 11, 1970, and on or about March 12, 1970, State Board repealed said Sections 2010 and 2011, as previously amended, in their entirety. State Board has not to the date hereof adopted any Rules defining "integration" or "segregation" or "racial balance" or "racial imbalance". Petitioners' rights and Board's duties are to be determined and adjudged as of the time of trial and judgment herein.

Therefore, the Court, from the evidence adduced upon the trial hereof, finds and adjudges:

(i) That, to constitute a racially integrated school in Board's District, the school's pupil enrollment must consist of not more than approximately forty-nine per cent and not less than ten per cent minority

pupils, the remainder of the student body consisting of white pupils;

(ii) That, to constitute a racially balanced school in Board's District, the school's pupil enrollment must consist of approximately the same racial proportions as exist in Board's District as a whole;

(iii) That a segregated school, in Board's District, is a school whose pupil enrollment consists of substantially more than forty-nine per cent of minorities, or any one thereof, or substantially more than fifty per cent whites;

(iv) That a racially imbalanced school, in Board's District, is a school whose pupil enrollment consists of substantially more of any one race or ethnic group than exists in Board's District as a whole;

(v) That the variations in composition of pupil enrollment, such as "approximately" or "substantially", as hereinbefore in these subparagraphs used, envision the human inability to achieve exact racial proportions in mixing the races and pupils, but

the result of the exercise of the highest of good faith and fair dealing in attempting to achieve an integrated enrollment in any one school. Board is charged by law, is under a duty specially imposed by law, in the exercise of the highest of good faith and fair dealing toward its pupils, to use and exercise its powers and authority, finances and processes so as to achieve, as closely as such good faith and fair dealing will reasonably enable and allow it to do, integration and racial balance in each of its schools so as to have a unitary school system.

XII. That no discretion or right is vested in Board by law to decide whether, in its opinion, integrated education will or will not affect the educational achievement of majority or minority pupils or whether or not, in Board's opinion, it is or is not "feasible" for Board to comply therewith. Board is under a duty specially imposed by law to comply therewith.

XIII. Whatever Master Plan or plans for integration be adopted by Board will require evaluation

in practice. The Court shall therefore retain jurisdiction until it is clear that segregation has been completely removed from Board's schools and that it has achieved substantial integration thereof.

XIV. Board's alleged open-transfer policies were not designed realistically to bring about, have not and will not bring about, desegregation. They were not and are not a plan for desegregation or integration. Open-transfer plans must be reasonably designed to and must meet realistically the problems of desegregation and integration. Therefore, Board's aforedescribed open-transfer policies are invalid.

XV. Board is under a duty specially imposed by law, with all due diligence and speed, to, in the exercise of the highest of good faith, accomplish the following:

(i) Evolve and adopt a meaningful Master Plan of Integration, a plan that will realistically work within a reasonable period of time, having for its aim, purpose and object a racially non-discriminatory

unitary school system comprising and applying to all of its schools as a whole and not merely for one or a group of schools, leaving others segregated; and

(ii) Evolve and adopt, as a part of the Master Plan the methods, means, mechanics, designs, tools and techniques to make said Master Plan work; and which shall in fact work; and

(iii) The Master Plan shall be made legally effective within and upon, i.e., imposed upon, the entire of Board's District at one time. If the consummation thereof in good faith requires the carrying out thereof in several steps over a reasonable period of time, Board may do so. The Court retains jurisdiction to determine and fix, from time to time, the reasonable periods of time for the step or steps for the carrying out and consummation of said Master Plan. The condition precedent therefor shall be good cause shown and the exercise of the highest of good faith by Board and its Executive Staff in attempting to carry out and consummate the Master Plan; and

(iv) The Master Plan shall incorporate the definition of "integration", an "integrated school", a "racially balanced school", a "segregated school", a "racially imbalanced school" and the "variations in composition of pupil enrollment", as hereinbefore provided. Board shall integrate its schools in accordance therewith; and

(v) The Master Plan shall, among other things, by its terms provide for: the manner and means of its periodic public review, with reasonable notice to parents of children involved, so that its schools shall at all times be integrated; and

(vi) The Master Plan shall provide for, and the methods, means, manner, mechanics, designs, tools and techniques shall effect, the selection of new school sites and construction of schools for and that shall eliminate segregated schools and create integrated schools, an integrated unitary school system.

XVI. Therefore, Board shall, and a Writ of Mandate shall be issued herein commanding it:

(i) To present to this Court, on or before the lst day of July, 1970, for its approval, in compliance with the Judgment of this Court and said Writ, upon notice to Petitioners and, as shall be prescribed by the Court, notice to the parents of Board's pupils of the hearing thereon, said Master Plan, together with the method, means, manner, mechanics, designs, tools and techniques for the carrying out and consummation of said Master Plan; and

(ii) That said Master Plan shall be designed for and be made legally effective and imposed upon the entire District and placed into operation prior to the school year commencing on or about September, 1970, so that in and during said school year, and under no circumstances to exceed the school year commencing September, 1971, said Master Plan shall be imposed upon, carried out and operating within and as to all of the schools in Board's District.

The Court retains jurisdiction to, for good cause shown and the exercise by Board and its Executive Staff of the highest of good faith, extend the foregoing specifed times. That only a prompt start, diligently, in good faith, pursued, to eliminate racial segregation from Board's schools, can constitute good-faith compliance and shall constitute a condition precedent to good cause; and

(iii) That Board is duty bound and shall, and the Peremptory Writ shall command it to, devote every reasonable effort, in the highest of good faith, toward initiating the desegregation of, bringing about the elimination of racial discrimination in, its public school system, at and within the times aforesaid.

The Court retains jurisdiction to hear, approve or disapprove said Master Plan and its methods, means, manner, mechanics, designs, tools and techniques for the carrying out thereof.

XVII. That Petitioners are entitled to have and recover of and from Respondent, as the reasonable

value of the services of their Counsel upon this proceeding, the sum $65,000.00 together with interest thereon at the rate provided by law, from and after the entry of Judgment herein and until payment thereof, plus Petitioners' costs and disbursements herein, also to be paid directly to Counsel.

XVIII. The Court retains jurisdiction, when the Judgment herein shall become final, to allow additional attorney's fees to Petitioner, for their Counsel, the sums allowed to be paid to such Counsel, for the reasonable value of the services which may be performed by Counsel from and after the date of entry of Judgment and the issuance of the Writ of Mandate and the entry of the Order on any motion for new trial. If such motion is made, and until the Judgment herein shall become final. Said fees so allowed shall be paid by Board.

XIX. The Court retains jurisdiction to appoint one or more Experts, upon motion of either party or on the Court's own motion, to assist and advise the Court in

the particulars, and for the purposes, set forth in the Court's Findings of Fact, and to fix and award to such Expert or Experts, from time to time, reasonable compensation for his or their said services. The compensation so fixed and allowed to be paid by Board.

XX. Board shall not, and the Peremptory Writ shall command it not to and prohibit it from, pending the adoption and approval of said Master Plan of Integration, do anything including by way of specification and not by way of limitation the selection of sites, construction of new schools, construction of additions to existing schools, adoption or modification of transfer policies or transportation policies, adoption, changes or modification of school attendance boundaries, which will maintain or continue or preserve or tend to maintain or continue or preserve the minority segregation presently existing in its schools. Board shall, and the Peremptory Writ shall command it to, and prohibit it from doing otherwise,

during said period of time, only select sites and build schools and build additions to its existing schools, and adopt or modify transfer policies and adopt or modify transportation policies, and do all other things reasonably necessary for and having as its objective and purpose the integrating of its schools and the desegregation of its schools now segregated.

XXI. Let a Peremptory Writ of Mandate issue, ordering Respondent as hereinabove adjudged and commanding it to appear before this Court, as aforesaid, upon notice, as aforesaid, on or before July 1, 1970, at the hour of 9:00 a.m., then and there to show cause what it has done to comply with said Writ of Mandate.

XXII. Judgment and the Writ of Mandate shall be entered accordingly.

XXIII. Let Judgment be entered.

DATED: May 12, 1970

/s/ALFRED GITELSON
Alfred Gitelson
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT, JUDGMENT FOR DAMAGES, COSTS AND PEREMPTORY WRIT OF MANDAMUS, DATED MAY 12, 1970

[3 C.T. 619-623]

ORDERED, ADJUDGED AND DECREED:

I. That Board is under a duty specially imposed by law, with all due diligence and speed, to, in the exercise of the highest of good faith, do all things and take all actions reasonably necessary to accomplish the following:

(i) Evolve and adopt a meaningful Master Plan of Integration, a plan that will realistically work within a reasonable period of time, having for its aim, purpose and object a racially non-discriminatory unitary school system comprising and applying to all of its schools as a whole and not merely for one or a group of schools, leaving others segregated; and

(ii) Evolve and adopt, as a part of the Master Plan, the methods, means, mechanics, designs, tools

and techniques to make said Master Plan work; and which shall in fact work; and

(iii) The Master Plan shall be made legally effective within and upon, i.e., imposed upon, the entire of Board's District at one time. If the consummation thereof in good faith requires the carrying out thereof in several steps over a period of time, Board may do so. The Court retains jurisdiction to determine and fix, from time to time, the reasonable periods of time for the step or steps for the carrying out and consummation of said Master Plan. The condition precedent therefor shall be good cause shown and the exercise of the highest of good faith by Board and its Executive Staff in attempting to carry out and consummate the Master Plan; and

(iv) The Master Plan shall incorporate the definition of "integration", an "integrated school", a "racially balanced school", a "segregated school", a "racially imbalanced school" and the "variations in composition of pupil enrollment", as hereinbefore

provided. Board shall integrate its schools in accordance therewith; and

(v) The Master Plan shall, among other things, by its terms provide for: the manner and means of its periodic public review, with reasonable notice to parents of children involved, so that its schools shall at all times be integrated; and

(vi) The Master Plan shall provide for, and the methods, means, manner, mechanics, designs, tools and techniques shall effect, the selection of new school sites and construction of schools for and that shall eliminate segregated schools and create integrated schools, an integrated unitary school system.

II. Therefore, Board shall, and a Writ of Mandate shall be issued herein commanding it:

(i) To present to this Court, on or before the 1st day of July, 1970, for its approval, in compliance with the Judgment of this Court and said Writ, upon notice to Petitioners and, as shall be prescribed by the

Court, notice to the parents of Board's pupils of the hearing thereon, said Master Plan, together with the method, means, manner, mechanics, designs, tools and techniques for the carrying out and consummation of said Master Plan; and

(ii) That said Master Plan shall be designed for and be made legally effective and imposed upon the entire District and placed into operation prior to the school year commencing on or about September, 1970, so that in and during said school year, and under no circumstances to exceed the school year commencing September, 1971, said Master Plan shall be imposed, carried out and operating within and as to all of the schools in Board's District.

The Court retains jurisdiction to, for good cause shown and the exercise by Board and its Executive Staff of the highest of good faith, extend the foregoing specified times. That only a prompt start, diligently, in good faith pursued, to eliminate racial segregation from Board's schools, can constitute good-faith

compliance and shall constitute a condition precedent to good cause; and

(iii) That Board is duty bound and shall, and the Peremptory Writ shall command it to, devote every reasonable effort, in the highest of good faith, toward initiating the desegregation of, bringing about the elimination of racial discrimination in, its public school system, at and within the times aforesaid.

The Court retains jurisdiction to hear, approve or disapprove said Master Plan and its methods, means, manner, mechanics, designs, tools and techniques for the carrying out thereof.

III. That Petitioners do have and recover of and from Board, as the reasonable value of the services of their Counsel upon this proceeding, the sum of $65,000.00 together with interest thereon at the rate provided by law, from and after the entry of Judgment herein and until payment thereof.

IV. That the Court retains jurisdiction, when the Judgment herein shall become final, to allow

additional attorney's fees to Petitioners, for their Counsel, the sums allowed to be paid to such Counsel, for the reasonable value of the services which may be performed by Counsel from and after the date of entry of Judgment and the issuance of the Writ of Mandate and the entry of the Order on any action for new trial, if such motion is made, and until the Judgment herein shall become final. Said fees so allowed shall be paid by Board.

V. That the Court retains jurisdiction to appoint one or more Experts, upon motion of either party or on the Court's own motion, to assist and advise the Court in the particulars, and for the purposes, set forth in the Court's Findings of Fact, and to fix and award to such Expert or Experts, from time to time, reasonable compensation for his or their said services. The compensation so fixed and allowed to be paid by Board.

VI. Board shall not, and the Peremptory Writ shall command it not to and prohibit it from, pending the

adoption and approval of said Master Plan of Integration, do anything, including by way of specification and not by way of limitation the selection of sites, construction of new schools, construction of additions to existing schools, adoption or modification of transfer policies or transportation policies, adoption, changes or modification of school attendance boundaries, which will maintain or continue or preserve or tend to maintain or continue or preserve the minority segregation presently existing in its schools. Board shall, and the Peremptory Writ shall command it to, and prohibit if from doing otherwise, during said period of time, only select sites and build schools and build additions to its existing schools, and adopt or modify transfer policies and adopt or modify transportation policies, and do all other things reasonably necessary for and having as its objective and purpose the integrating of its schools and the desegregation of its schools now segregated.

VII. That a Peremptory Writ of Mandate do issue, ordering Respondent as hereinabove adjudged and commanding it to appear before this Court, as aforesaid, upon notice, as aforesaid, on or before July 1, 1970, at the hour of 9:00 a.m., then and there to show cause what it has done to comply with said Writ of Mandate.

VIII. That Petitioners do have and recover of and from Respondent, Petitioners' costs and disbursements herein, hereby taxed in the sum of $56,662.12. Said sum shall be paid directly to Counsel for Petitioners.

The Clerk shall enter this Judgment.

DATED: this 12 day of May, 1970.

/s/ALFRED GITELSON
Alfred Gitelson
JUDGE OF THE SUPERIOR COURT

SUPERIOR COURT, MINUTE ORDER, DATED JULY 5, 1977
[8 C.T. 2267-2279]

The mandate previously issued in 1970 by this Court to desegregate the Los Angeles Unified School District was affirmed by the California Supreme Court June 28, 1976. The response to that order was a plan for integration filed by the Los Angeles Unified School District (LAUSD) Board in this department on March 18, 1977. A hearing was immediately commenced to determine if this plan complied with that mandate. Nearly twelve weeks of testimony was produced in its support. At the end of the testimony, a motion was made by petitioners, and joined in part by intervenors Integration, Watson and B.E.S.T., requesting the plan be rejected as insufficient compliance with the mandate. This court now grants petitioners' motion.

The plan fails because it does not desegregate any school in the district and even were it to be found by this Court that it would desegregate schools, it would

reach so few of the 231 segregated minority schools as to be wholly ineffective in desegregating this district.

This conclusion is based upon the Court's perception of the following evidence:

LAUSD pupil census as of October, 1976 — kindergarten through twelfth grade — was 592,931, distributed among 559 schools, of which:

435 are elementary schools

75 are junior high schools

49 are senior high schools.

The ethnic and cultural identification of these students was, as of October 1976:

WHITE:	219,359 or 37.0%
BLACK:	142,778 or 24.1%
HISPANIC:	190,363 or 32.1%
OTHER NON-WHITE MINORITY:	40,431 or 6.8%

The Board in the plan identifies as segregated schools, those schools having a minority (non-white) to white or white to minority ratio of not less than 80%

to 20%. All other schools by this definition are integrated.

The segregated schools are either segregated minority or segregated white. It is the former which will be further described.

Of the total segregated minority schools:

183 are elementary schools

26 are junior high schools

22 are senior high schools.

Within the segregated minority elementary schools there are:

113 schools—98% to 100%—having
101,162 minority students

24 schools—95% to 97%—having
17,797 minority students

46 schools—80% to 94%—having
34,745 minority students

TOTAL 183 [schools having]
153,704 [minority students]

Within the segregated minority junior high schools there are:

17 schools—98% to 100%—having
31,577 minority students
5 schools—95% to 97%—having
7,595 minority students

4 schools—80% to 94%—having
6,593 minority students

TOTAL 26 [schools having] 45,765
[minority students]

Within the segregated minority senior high schools there are:

14 schools—98% to 100%—having
25,385 minority students

4 schools—95% to 97%—having
8,395 minority students

4 schools—80% to 94%—having
10,675 minority students

TOTAL 22 [schools having] 44,455
[minority students]

The mandatory portion of the Board's plan designates only 38 elementary segregated white and 55 elementary segregated minority schools as definitely being included in the desegregation process. Unaffected by any desegregation plan are 128 minority segregated elementary schools, of which 99 are in a 98% to 100% segregated minority classification; 12 in the 95% to 97% segregate minority classification; and 17 in the 80% to 94% segregated minority classification. A total of 111,761* of the 153,704 students in minority elementary segregated schools remain racially isolated.

The plan vaguely envisions that there shall be at least one year of integrated learning experience for students in their high school term (high school includes seventh through twelfth grades). Other than these

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*This figure is well understated because it assumes that all 50 elmentary schools in the mandatory phase are segregated minority. This is not necessarily true, but there is insufficient information to make any other assumptions.

vague voluntary programs no requirement for desegregation is indicated. The effect of this plan leaves most of the segregated junior and senior high schools in the district in a segregated condition. The vast majority of the 111,761 minority elementary students, who are untouched by this plan, will go to 95% to 100% segregated minority junior high schools and thence to segregated minority high schools. They will not have been relieved in any manner of their racial isolation during their entire school experience.

The basic tool of the plan is the Educational Planning Unit (EPU). This device is an attractive educational tool which clusters segregated schools and allows the parents and staff of the schools comprising the EPU to determine what type of voluntary integration will be accomplished within their units. The EPU concept has been praised by the witnesses produced by the Board because of its voluntary nature and the participation given the parents and staff of the schools

in choosing among the several programs offered for integration.

The plan has built-in constraints which prevent any effective expansion for increased impact on the segregated minority schools. Most inhibiting of these constraints are geographical and definitional. The scope of Educational Planning Units (EPUs), is determined by both. The limitation of mandatory transportation distance determines the geographical limits of the EPU. The definition of segregated schools and integrated schools determines which schools within those geographical limits may be included in an EPU. This last definition excludes all pupils in schools defined as integrated, which are within the geographical boundary of the EPU but regardless of the exact ratio of the majority to minority pupils, whether 79-21 or 50-50.

The Board concedes that the ratio by which a school is defined to be either integrated or segregated has no articulated rationality. Thus, by arbitrary

standards, large numbers of students may be included or excluded with any change of ratio defining segregated schools. With the existing definitions there are no mandatory provisions in the plan to expand the scope of the EPUs. These constraints not only operate on the mandatory provisions of the plan but limit the operation in the voluntary options given the schools participating in an EPU by limiting the number of schools in an EPU.

There is only one mandatory provision which remains as the sanction for failure to opt for a voluntary plan and it is to the mandatory provision that this order speaks, for if the EPU fails to elect a voluntary means of segregation by February 1978, the Board will require that a minimum of 50 elementary schools within the EPUs enter into the mandatory method of integration known as Specialized Learning Centers (SLC).

The ratio of the total student ethnicity within the EPU schools will be not less than 40/60% majority/ minority or minority/majority.

Nineteen elementary EPUs have been identified without definite determination of their sites.

Through the SLC, the Board contends that by bringing together youngsters of the same grade from schools comprising the EPU for part of a day and part of a year, the schools which each youngster attends as his home school will become desegregated. The SLC is planned to operate as follows:

> The kindergartners within the schools comprising the EPU are exempt from any integration.
>
> Children in grades 1 through 3 will be required to have a cultural exchange experience with children of the same grade of other schools comprisng that EPU for a minimum of ten days each scholastic year. These exchanges will be sharing experiences,

which the Court perceives to be in the form of field trips.

At the 4th through 6th grade levels, each child in the 50 schools will participate part-time in an SLC. For two-thirds of his normal school year he will maintain his regular school schedule and curriculum at the school to which he is regularly assigned. For one-third of the school year he will report, presumably one hour early, to his regularly assigned segregated school and remain there for one hour. During this hour, he will be given instructions in the basic skills; reading, mathematics and writing. He will then be placed on a bus and go to a facility housing the Specialized Learning Center. Upon his arrival with his home school teacher or aides, he will be met by two master teachers permanently assigned there, teaching aides, and youngsters from the same grade from the

other segregated schools comprising his EPU. His curriculum while there will be limited to the social sciences, with emphasis on non-competitive, cooperative and individual learning techniques. The youngsters will have lunch together, and at 2:00 or 2:30 p.m. each student will then be placed on a bus and returned to his regularly assigned segregated school. The defined SLC plans stop at the end of the sixth grade. Thereafter, he becomes eligible, if attending the right school, to participate for one year in a cultural exchange or integrated program before graduation from senior high school. This high school program is vaguely outlined in the plan without specific guidelines.

Much time expended in these hearings was in listening to testimony praising the educational concepts of the EPUs and the SLCs as valuable, although new and novel techniques for integration.

The Board's position is that these techniques are designed to alleviate the consequences of segregation and thereby desegregates schools. This view is not shared by this Court, nor by any other court in any reported cases where similar provisions for desegregation were advanced. No witness presented by the Board made such a claim and several asserted that the plan did not desegregate. This Court has repeatedly urged that desegregation must precede or accompany integration.

This Court agrees that the respondent Board is faced with a formidable task, given the geographical size of the district, the vast numbers of students, the increasing minority population, the decreasing white population, the numbers of limited-or-non-English speaking Hispanic students (100,000), the limitations on both taxation and expenditures of money, and lastly, the Board members' own personal perceptions of their constitutional duty. But nothing this Court has heard has sustained the argument of the Board that the

Board can do nothing further in relieving segregation. It is clear from the evidence that this plan, even if approved by this Court, would result in this district continuing to maintain three separate school systems: brown, black and white, each isolated from the other.

The voluntary aspects of the plan are limited by the EPUs to the schools comprising the EPUs and to an existing program called Permit With Transportation (PWT). This Court has previously noted in this order the constraints upon the voluntary aspects of the EPU component. PWT allows certain students to voluntarily bus out of their segregated school to other schools upon a space-and-transportation available basis and for so long as it helps desegregate the district. The plan envisions that the present PWT program will be increased from 9,500 users to 20,000 at the end of the academic year 1977-78 and thereafter to 30,000 at the end of the 1978-79 year. At present, the Permit With Transportation program is used almost entirely by minority students, busing themselves out of minority

segregated schools to segregated white schools. Said busing often consumes an hour to an hour-and-a-half one-way, and very seldom relieves the minority impact on the sending schools. The proposed increase in cost of this busing ($768 per annum per pupil) is more than three times the present cost of "distance and hazard" busing in the district (Less than $200 per annum per pupil). Testimony in the case indicates that there is little expectation that there will be any measurable increase in use of the PWT program by white students; that it primarily is a minority-used student program. PWT offers little hope to relieve desegregation because of the limited numbers envisioned in the plan; because it does not desegregate the sending schools; and, because of the high cost of maintaining the program. It is constitutionally suspect as a major desegregation device because it places the burden of relieving the racial isolation of the minority student upon the minority student.

The other components of the plan will not be discussed because of its two basic defects; to wit, the minimal scope in reaching the 231 segregated schools in this district, and the failure to desegregate any school that is within its limited scope.

The Court specifically finds that the plan was hastily conceived as a reaction to the implications of the CACSI plan and that no effective in-depth study was made of the effect of the plan upon segregated schools of this district, nor any cost/benefit analysis made of the plan, nor any alternative plans seriously considered.

This Court urges the Board to look realistically at this very difficult problem with the understanding that neither it nor this Court can ignore the mandate of the State Supreme Court. There is solace, perhaps, in knowing that by the end of 1975 there were at least 1500 school districts in the United State subjected to this same trauma; that most of these desegregation efforts have been successful, although some have not.

Their history teaches us that the index of a successful effort has been the resolution and good faith shown by a Board of Education and its staff in preparing and leading their community in a court ordered desegregation of its schools. It is the Court's hope that the Los Angeles School District will be as fortunate.

Therefore, and in light of the above, the Court orders the respondent Board of Education to:

1. Return to this Court within 90 days hereof a plan or plans which realistically commence the desegregation of this district by no later than February 1978, and which plan or plans promise within their terms to complete such desegregation process within a reasonable period thereafter.

2. In order that this Court may ensure that it has sufficient information to evaluate any plan or plans submitted, the Board shall consider all reasonable alternative plans to the plan or plans which it shall finally submit to this Court. Such alternates shall include other plans submitted to it and plans developed

internally. Both the plan or plans to be submitted and such alternates shall be either accompanied or supported by detailed findings and conclusions, including all evidentiary data; summaries of the opinions of experts' studies, both staff and outside; all statistical information; all cost and benefit studies; all financial information; all educational benefits and detriments; and, any and all information developed either in support of its final plan or plans or used in evaluating the alternative plans.

3. In evaluating and analyzing alternative plans, the Board shall not be precluded from reexamining Exhibit "A" or the CACSI plan.

4. The Board shall present to this Court, so that it may be able to judge the reasonableness and feasibility of any plan or plans presented it, a cost and feasibility study of desegregating all of the minority elementary schools within the

a) 98 to 100% minority segregated range;

b) 90 to 100% minority segregated range;

and,

c) 80 to 100% minority segregated range, without regard to any definition of integrated schools.

The same request is made for the Junior High Schools and Senior High Schools.

This order is made for the singular purpose of obtaining the cost and feasibility of a maximum effort in order that this Court may develop a standard for rationally judging the reasonableness and feasibility of any plan submitted.

5. The respondent Board shall prepare a tentative schedule for its study and deliberations and submit this schedule to this Court within fourteen (14) days hereof.

6. In order that the work of this Court shall be better assisted in the evaluation of the resoluteness of the Board in complying with the mandate, and further to ensure that the deadline herein are being met, and lastly, to help the Court in the ultimate evaluation of the completeness of the Board's compliance in any plan

or plans submitted, the Court intends to appoint as an offier of this Court, a Referee under Code of Civil Procedure section 639(4) to report to this Court periodically and also upon request, either in writing or orally, the efforts and work of the Board and its staff respecting compliance with this order. This officer shall be given full access to all information and proceedings of the Board and its staff concerning the respondent's compliance with this order. Upon application to this Court and on notice, he may request that this Court issue any further orders to assist him in this duty. His compensation shall be fixed and paid pursuant to further order.

7. The Board and its staff shall give to the designated representatives of the petitioners and all intervenors all reasonable access to the Board and its staff's planning process and data so that eventually this Court may be better informed.

8. The Court retains jurisdiction to make such further orders as may seem proper and just in the

circumstances and to conduct such hearings as may seem necessary to better inform it and to aid it in the enforcement of the mandate.

9. Pending further hearing. nothing in this order shall be construed to inhibit the Board from instituting any efforts to voluntarily desegregate its schools.

10) Upon the filing of the plan or plans, each of the other parties herein may file its written objections or support of that plan within fourteen (14) days thereafter, which time the Court shall then set a date for a hearing thereon. The procedure for such hearing to be determined by conference of the parties held prior thereto; the time and place to be set by this Court.

11) The Court now sets Thursday, July 7, 1977, at 10:00 a.m., as the date and time to consider what the respondent's claim to be an unruled upon motion and to further consider the designation of the Referee to be appointed and the instructions to be given him in

monitoring the proceedings of the respondent Board pending the submission of a plan.

DATED THIS 5th DAY OF JULY, 1977.

EGLY

SUPERIOR COURT, MINUTE ORDER, DATED FEBRUARY 7, 1978

[23 C.T. 6828-6834]

At the conclusion of respondent's case which constituted the filing of

(a) Exhibit 000;

(b) Six accompanying explanatory volumes;

(c) A file of those minutes of the meetings of the Board of Education in which the subject of discussion was desegregation;

(d) Filing of the declaration of the President of the Board, Howard S. Miller, setting forth the Board's intentions respecting indices of segregated schools; and

(e) The Board's answers to 22 questions propounded by this court.

Motions were made by the petitioners, intervenor Integration Project, intervenor Loveland and Keipp and intervenor BUSTOP on varying grounds to reject the plan encompassed in those filings.

The plan, described in brief, calls in broad terms for the eventual integration of the entire district. The plan requires, commencing September 1978, that an opportunity be given some students to voluntarily participate in the desegregation in all grades (K-12) district-wide. Various devices to attract such volunteers are proposed, such as magnet schools and optional enrollment plans. Options will also be given within certain selected school groups or leagues composed of segregated minority schools and segregated white schools in grades 4 through 8 to voluntarily desegregate. While within those grades in those leagues the emphasis will be on voluntary desegregation, the plan calls for alternate mandatory assignment, failing the exercise of the voluntary options. Plan II has no other mandatory provisions in or out of the league configurations to motivate voluntary choices. However, within the schools defined as currently integrated and within the league schools at grades 4 through 8, such mandatory provisions will

involve every white segregated elementary school and currently integrated school within the district and further anticipates the involvement of 64 minority segregated schools within those grades and within those leagues. Untouched by any mandatory provision, however, will be the remaining 204 minority segregated schools. The plan has no timetable bringing most of these schools or the omitted grades into any expanded voluntary program or any alternate mandatory program, nor details of any such provisions. Further, there is no discussion as to when the ultimate goal as set by the district for complete integration will be reached. Petitioners, intervenor Integration Project and intervenor Loveland and Keipp, point out that these deficiencies are fatal to the approval of this plan. Intervenor BUSTOP argues that the present mandatory provisions that are included require that the plan be rejected because of resegregation of the district through white flight. The respondent Board and intervenor B.E.S.T. support the plan while

admitting that there are omissions in specificity and ask that the Board be given time to correct those omissions after the plan has been initiated. Further, they ask that the plan be allowed to commence forthwith.

Crawford v. Board of Education, 17 C.3d 280, requires that the Board devise a plan and initiate a course of action to eliminate or alleviate segregation. The court's interpretation of this mandate requires a plan which, in its terms, is sufficiently specific so that the promise to achieve a goal of desegregation within a reasonable time can be determined by inspection of the terms of the plan itself. Patently, the plan does not comply with this standard because of the omissions of the specifics on how it is to be done and when it is to be finished. These omissions place the petitioner in the untenable position of having obtained a writ of mandate but not knowing the nature and the time of the relief. The proposed plan also places the court in the position of

having to supply the missing provisions if enforcement of any order approving the plan is required.

The court has determined, however, that these objections do not necessarily require that the plan be now rejected or that the court now assume the respondent's role in preparing a plan. The plan offers a structure which allows for major additions and modifications in accord with a timetable. The Board's broadly stated goal of complete integration is the same goal as is required by this court in the writ. The Board has taken an important initial step toward the eventual compliance with the writ of mandate by the filing of a plan for the desegregation of the middle grades which involves the vast majority of the white students within those grades either by means of the use of the definition of desegregated schools or by provision for inclusion within the league configurations. It is the court's order that it now approves the implementation by the Board of this plan, and secondly, that it will further examine the plan to

remedy those omissions in the manner as set forth below. The court finds that in spite of the insufficiencies of Plan II the Board has made a beginning in the long delayed journey toward its stated goal of full racial integration of the district and has commenced compliance with this court's mandate. By reason of the above, the court now denies each of the motions of the petitioners, intervenor Integration Project, and intervenor Loveland and Keipp without prejudice to renew if the respondent has not remedied these insufficiencies or has not, in the alternative, satisfactorily explained why the mandate does not require such remedies. The time for the Board to include within its plan the amendments and modifications is set for December 31, 1978.

The motion of intervenor BUSTOP is denied. The Board, as an adjunct to Exhibit 000 (Plan II), has filed the minutes of the Board's proceedings in the adoption of Plan II and appendices to the plan which included studies of the effect of this plan and of other plans on

resegregation of the district through white flight. The court at this time will not substitute its judgment in this matter for the judgment of the respondent. Resegregation, however, is a matter which should be examined by the expert witnesses when their reports are returned to this court and the witnesses examined by the court and the parties.

So that this court will be better informed of the sufficiency of any proposed amendments to the plan, the court will appoint on its own motion under Evidence Code, section 730, such experts on school integration and desegregation as it feels necessary. Such experts will examine the issues set forth below for the benefit of the court and the parties and present themselves and their reports to this court for examination respecting their conclusions.

The issues to be examined are:

(a) All amendments necessary for the plan to reach all the segregated minority schools either by inclusion in the physical desegregation plan or by some

other means to eliminate or alleviate the effects of segregation, Further, such experts shall form and give opinions as to the timetable for inclusion and the means to implement such amendments.

(b) The necessity of the plan to include improved voluntary provisions and, in the alternative, mandatory provisions for grades K through 3 and grades 9 through 12 or any of them. Further, the experts shall form an opinion and give a report thereon on the timetable for implementation and the means therefor.

(c) The necessity of the plan to have any additional provisions against resegregation by reason of white flight in the light of any proposed amendments to the plan.

(d) The rationality and application of the present definitions used by the School Board both in defining a segregated school and a currently integrated school and at the same time form and give their opinions on the various definitions and applications as proposed by

the petitioners, all intervenors and the amicus curiae, Caughey.

(e) The order of priority, if any, that each issue should be examined and reported on.

(f) The time necessary to report and develop each witness's opinion as to all such issues with the understanding that they and their reports will be examined by this court and the parties in sufficient time for the Board to act by December 31, 1978. Such estimated date should be furnished this court within three weeks of such appointment.

(g) Such further studies and opinion as to such issues which may seem necessary to this court to adequately inform it and the parties.

The court intends to commence hearings forthwith on the identity and number of and the charge to such witnesses, the means of reimbursement, the forms of reports and sources from which such opinions should be formed, located and used.

By this order the court is indicating it is only approving Plan II as an initial step toward eventual desegregation of this district. Until the court has examined the form of further proposed amendments to the plan and until the Board has been given an opportunity to act thereon by either implementing such amendments or including them in future plans with sufficient specificity to determine whether or not the Board can meet and intends to meet the mandate, any final approval of Plan II will be withheld and this court will, pending that approval, continue its jurisdiction in supervising compliance with the previously issued writ of mandate.

Dated: February 7, 1978.

/ss/EGLY
EGLY, Judge of the Superior Court

SUPERIOR COURT, MINUTE ORDER, DATED MAY 30, 1979
[41 C.T. 12151-12153]

Motion for continuance brought by the respondent, joined by intervenor Bustop, argued and heard on May 30. All parties being present, the Court now grants the motion for continuance, in part, by vacating the hearing date presently set subject to the following conditions: Because the present hearings concern amendments and changes to the existing plan under which the respondent Board is operating, and because the Court has previously heard and approved that plan, except as to its scope, but has not heard or listened to the amendments and the objections thereto, therefore in order to maintain the status quo pending the continued hearing, the Board shall not reduce its desegregation efforts under the present plan which it operates nor shall it add to said plan without a hearing having been noticed in this court and approval thereof obtained. This restriction shall include not only the Board's operation under the written plans but such

other actions such as capital improvements which will affect attendance boundaries and assignments, major personnel and management decisions which would affect desegregation and reductions or increases in the size, scope and intensity of any schools which are grouped or paired for desegregation, or changes in midsite school operations. Included, also, is any major change in increase or decrease of the PWT program. The enumberation of these is illustrative only and not to be considered as limitations, as it is the intent of this order to maintain the desegregation operations as nearly as possible without change pending the hearings. Further, pending this hearing, the Board shall make available to this court sufficient personnel and data for this court to create simulations of model plans for the three major viewpoints expressed by the parties in this case of what an integration plan for the district should be. The Court intends to simulate an all-volunteer plan, a triethnic plan and a simulation to test the possibility of an expansion to the present plan

and its propcsed amendments. Further, that simulation shall be designed to test the limitations which the Board says exists to prevent further expansion and lastly to determine the practicality of any further change in scope or intensity of the present plan. These simulations are necessary for the Court's own information, it having been not furnished by the parties.

In addition to the foregoing, the Court has been made aware through the statements made in the motions filed for continuance and the oral arguments of the parties of the possible redundancies, immaterialities and excessive expenditures of time which is probable in the previously scheduled hearings. The Court, therefore, is requiring a further pretrial hearing respecting the nature of the evidence to be produced by the parties. Therefore, it is ordered that prior to June 25, 1979, each party as a prerequisite to calling any witness, except for good cause, shall have filed with this court the names of the witnesses to be

called, the addresses where said witnesses will be available, and whether the witness is a percipient or participant witness, or whether the witness is an expert witness. Further, the statement shall contain in detail what the witness is expected to testify and on what issue the testimony will bear. If the witness is an expert, such statement will contain the opinion which the expert is going to state and the basis for that opinion. If the witness is a percipient witness or a participant witness or custodian of records, a detailed statement as to what facts that witness will testify to and on what issue. The date of June 25, 1979 at the hour of 10:00 A.M. is set for a further pretrial hearing for motions and rulings under Section 352 of the Evidence Code, or other appropriate sections, in order to prevent redundancy, immateriality, and waste of the Court's and parties' times. At this hearing, the Court should be in a position to set a realistic trial date and will do so.

DATED: May 30, 1979.

/ss/EGLY
PAUL EGLY, Judge of the
Superior Court

SUPERIOR COURT, APPLICATION FOR MODIFICATION OF ORDERS, DATED NOVEMBER 14, 1979
[45 C.T. 13312-13316]

Pursuant to Article 1, Section 7(a), as amended, of the California Constitution, respondent Los Angeles City Board of Education requests that this Court's orders of February 7, 1978, and May 30, 1979, be modified to eliminate those portions of the desegregation plan implemented pursuant to those orders which require the mandatory reassignment of pupils for the purposes of desegregation.

Article 1, Section 7(a) of the Constitution was amended by the enactment of Proposition 1 on November 6, 1979. That measure, which both the Senate and the Assembly had passed, and which received 69% of the vote count statewide and 74% in Los Angeles County, provides in part that

> "no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such

party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

"Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification."

Article 18, Section 4 of the California Constitution provides:

"A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. . . "

Proposition 1, which does not "provide otherwise," became effective on November 7, 1979.

Because of the overwhelming legislative and public support which Proposition 1 received, the Board on November 8, 1979 voted 5-1 to seek to modify this Court's orders to conform to Proposition 1's terms.

We recognize that this application raises several issues which the parties and this Court must now address. These include:

1. The constitutionality of Proposition 1. (The Board does not raise this threshold issue, but petitioners have in the past indicated that they might do so.)

2. Whether this Court, applying the facts as they exist today, could properly determine that the Board had violated the Equal Protection Clause of the 14th Amendment to the United States Constitution and could, under federal decisional law, impose by reason of any such violation a remedy

involving mandatory pupil school assignment or transportation. This issue includes two subparts:

a. The nature and effect of Judge Gitelson's 1970 Findings of Fact and Conclusions of Law in this action.

b. What additional proceedings must occur before this Court can determine whether a violation of the Equal Protection Clause has occurred.

3. Whether the current remedy proceedings should be suspended or continued pending the resolution of the foregoing issues.

This list may not be exhaustive.

Briefly stated, the Board contends that Proposition 1 is constitutional, that the Board has committed no de jure violation of federal law, that Judge Gitelson's

findings do not support a conclusion of de jure violation, and, in all events, they are neither res judicata nor the law of this case, and that this Court must hold a hearing to determine whether a federal court, sitting today, would find a de jure violation and impose a remedy involving pupil school assignment or pupil transportation.

The Board requests that a briefing schedule be established with respect to the foregoing issues and any others which relate to the effect of Proposition 1 on this action. Since the Board is under an obligation under **Crawford** to implement a desegreation plan and since even a finding of systemwide de jure violations would require a remedy hearing and a consideraion of alternative plans, the Board proposes that the remedy proceedings continue while briefs on the foregoing issues are being prepared, until such time as, and if, they may need to be interrupted for a hearing on the issue of liability under federal law.

Dated: November 14, 1979.

Respectfully submitted,

McCUTCHEN, BLACK,
VERLEGER & SHEA
G. WILLIAM SHEA
PETER W. JAMES
DAVID T. PETERSON
MICHAEL M. JOHNSON
JUDD L. JORDAN

JERRY F. HALVERSON

By /ss/G. William Shea
G. William Shea
Attorneys for Respondent

SUPERIOR COURT, PETITIONERS' REPLY TO BOARD'S MEMORANDUM IN SUPPORT OF APPLICATION TO MODIFY MINUTE ORDERS AND TO BUSTOP'S OPENING BRIEF CONCERNING ARTICLE I, SECTION 7(a), OF THE CALIFORNIA CONSTITUTION AS RECENTLY AMENDED, DATED DECEMBER 13, 1979

[47 C.T. 13952-14068]

[Text omitted.]

SUPERIOR COURT, APPENDIX TO PETITIONERS' REPLY MEMORANDUM TO BOARD'S MEMORANDUM IN SUPPORT OF APPLICATION TO MODIFY MINUTE ORDERS AND TO BUSTOP'S OPENING BRIEF CONCERNING ARTICLE I, SECTION 7(a) OF THE CALIFORNIA CONSTITUTION AS RECENTLY AMENDED, DATED DECEMBER 18, 1979

Declaration of Fred Okrand
dated December 18, 1979
[47 C.T. 14073-14074]

The undersigned states:

I am one of the attorneys for petitioner in the within action.

Attached hereto as Exhibit "A" are copies of the newspaper articles examined by me and from which were taken the excerpts quoted in Point IV, of Petitioner's Reply Brief to Board's Opening Memorandum in Support of Application to Modify Orders and to Bustop's Opening Brief Concerning Article 1, Section 7(a) of the California Constitution as Recently Amended.

Attached hereto as Exhibit "B" is a copy of Senator Robbins' "Californians Against Forced Busing" letter and questionnaire referred to in Point IV of the accompanying brief.

Attached hereto as Exhibit "C" is a copy of SB1244, referred to in Point IV, of the accompanying brief, authored by Senator Alan Robbins (D-Van Nuys) and introduced by him in the California Senate on July 19, 1979.

Attached hereto as Exhibit "D" are the press releases issued on October 30, 1979, by Secretary of State [Eu] and Attorney General Deukmejian, referred to in Point IV of the said Petitioner's Reply Brief.

Attached hereto as Exhibit "E" are copies of the letters referred to in Point IV, of said brief that I wrote to each of the assemblypersons and senators of the California Legislature on January 11 and 16, 1979 respectively. The last paragraph of the letter to Senator Robbins had a slightly different wording.

Attached hereto as Exhibit "F" are newspaper clippings concerning the recall of Howard Miller from the Los Angeles Board of Education.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Los Angeles, California this 18th day of December, 1979.

/s/_____

Fred Okrand

EXCERPTS FROM CALIFORNIA NEWSPAPER ACCOUNTS

Proposition 1

47 Clk's. Tr. 14079; Siskiyou News, Jan. 11, 1979:

> Another measure to restrict the power of state courts to order schools to integrate has begun to move through the Legislature, and supporters think it will pass this time.
>
> The constitutional amendment, aimed primarily at overturning Los Angeles' mandatory busing program, was sent to the Senate floor Wednesday by the upper house's Education Committee.

47 Clk's Tr. 14081; Riverside Enterprise, Jan. 11, 1979:

> A twice defeated measure intended to overturn school integration programs in Los Angeles and some other California cities easily cleared a state Senate committee yesterday.

* * *

Robbins said the amendment could also affect San Diego, Stockton, Fresno and San Bernardino, which he said have either begun mandatory busing programs or may have to do so under state court orders.

47 Clk's Tr. 14100; Los Angeles Examiner, Jan. 11, 1979:

The battle by forces seeking to weaken or halt mandatory busing in Los Angeles moved forward on several fronts yesterday.

In a key victory, a proposal that would put the issue of limiting mandatory busing statewide before the voters this June easily cleared its first legislative hurdle.

On a 10-to-1 vote the state Senate Education Committee approved the measure by Sen. Alan Robbins, D-Van Nuys, and sent it to the Senate floor. Robbins has vowed to stop mandatory busing in Los Angeles by the end of the year.

* * *

Robbins yesterday confidently predicted that his measure would easily pass in the full Assembly.

"The politics of this whole issue changed when the metropolitan plan was announced," he said, referring to the proposed busing plan that would incorporate hundreds of Southern California school districts.

* * *

Robbins' measure is an attempt to overturn the Los Angeles busing plan.

47 Clk's. Tr. 14084; Jan. 11, 1979:

The Robbins amendment is aimed at ending the busing which began in Los Angeles last September after the California Supreme Court upheld a lower court ruling that Los Angeles school officials were intentionally segregating students.

Last November, the busing dispute in Los Angeles began to spread into surrounding counties with the release of a broader metropolitan plan proposed to the court which involved busing students from Orange County, as well as from Ventura, San Bernardino, and Riverside counties.

Opponents of busing from all those areas appeared before the Senate panel Wednesday, repeating again and again Robbins' plea to "stop the turmoil and help save education in the State of California."

* * *

Robbins told the panel that his amendment will give Los Angeles area parents "freedom of choice in deciding where their children should be taught."

47 Clk's. Tr. 14086; Santa Rosa Press Democrat, Jan. 11, 1979:

He [Robbins] believed if the measure were approved by voters, an eventual decision by the U.S. Supreme Court would end busing in Los Angeles schools.

47 Clk's. Tr. 14085; Watsonville Register Pajorian, Jan. 11, 1979:

Emotion-laced testimony on the measure included statements from nearly 30 foes of the Los Angeles busing program that began in September, including two Los Angeles school board members who said the program has been costly, disruptive and unsuccessful.

* * *

The measure passed the Senate twice last year but died in an Assembly committee. An attempt by Robbins to put the question on the ballot through the initiative process was unsuccessful.

47 Clk's. Tr. 14083; Vallejo Times-Herald, Jan. 11, 1979:

> On a 10-1 vote, the Senate Education Committee approved a constitutional amendment by Sen. Alan Robbins, D-Van Nuys, despite a plea from the panel's only black member to kill it.
>
> Sen. Diane Watson, the first black woman to serve in the upper house, said the measure was a "dangerous precedent" that could weaken the ability of California courts to strengthen civil liberties.
>
> "What we are doing is tampering with the independence of the judiciary and when you start doing that you start to endanger the effectiveness of the California Constitution," said Watson, the only committee member who voted no.

47 Clk's. Tr. 14079; Siskiyou News, Jan. 11, 1979:

> Senators have twice approved similar measures by the same author, Sen. Alan Robbins, D-Van Nuys, since 1977. But both died in the Assembly.
>
> This year supporters are relying on the fear of many Los Angeles-area residents that the Los Angeles plan will spread to nearby districts. They say this fear should give them the votes needed to get the amendment out of the Assembly Judiciary Committee.

* * *

47 Clk's. Tr. 14082; Long Beach Press Telegram, Jan. 11, 1979:

> ROBBINS SAID THE amendment could also affect San Diego, Stockton, Fresno and San Bernardino, which he said have either begun mandatory busing programs or may have to do so under state court orders.

47 Clk's. Tr. 14087; Richmond Independent, Jan. 14, 1979:

> Another measure to restrict the power of state courts to order schools to integrate has begun to move through the Legislature, and supporters think it will pass this time.
>
> The constitutional amendment, aimed primarily at overturning Los Angeles' mandatory busing program, was sent to the Senate floor Wednesday by the upper house's Education Committee.
>
> * * *
>
> This year, supporters are relying on the fear of many Los Angeles-area residents that the Los Angeles plan will spread to nearby districts. They say this fear should give them the votes needed to get the amendment out of the Assembly Judiciary Comittee, its stumbling block in past years.

47 Clk's. Tr. 14079:

> He [Sen. Robbins] said the measure would affect pending court cases involving schools in San Bernardino, San Diego, Stockton and Fresno but would not affect federal court ordered busing in San Francisco and Pasadena.

47 Clk's. Tr. 14091; Los Angeles Times, Jan. 18, 1979:

> A state constitutional amendment designed to overturn Los Angeles' court-ordered school integration plan — including some mandatory busing — was approved overwhelmingly by the state Senate today.

47 Clk's. Tr. 14075; Los Angeles Times, Jan. 18, 1979:

> Indeed, Robbins, a San Fernarndo Valley Democrat, is already looking beyond the Legislature to the voter approval that will be necessary to put his measure into effect.
>
> Rather than wait until June 1980, when the proposed amendment normally would

appear on the ballot, Robbins has introduced a bill for a special statewide election August 28, just before school opens next fall. Thus, Robbins says, he will prevent the current compulsory busing program in Los Angeles from going into the second school year.

* * *

The Committee has killed the Robbins' Amendment twice in the past, with [Assemblyman] Imbrecht among those who refused to vote for it. However, since the vote last year, the metropolitan plan has been proposed, and it is conceivable that its adoption could require the busing of students from Imbrecht's district to help integrate Los Angeles Schools.

The metropolitan plan he said, helped him decide that something about busing must be done. Robbins has contended all along

that the metropolitan plan has been his most important ally this year.

In any case, with Imbrect on his side, Robbins now counts seven votes on the 13 member Judiciary Committee, the number necessary to push his measure through.

47 Clk's. Tr. 14076; Torrance Daily Breeze, Jan. 18, 1979:

A constitutional amendment designed to overturn Los Angeles' court-ordered school integration plan was approved overwhelmingly by the state Senate today.

47 Clk's. Tr. 14077; Los Angeles Herald-Examiner, Jan. 19, 1979:

A proposal to scuttle Los Angeles' massive forced busing program has easily won State Senate approval but now goes to an Assembly committee where heavy opposition will try to block it.

47 Clk's. Tr. 14078; San Fernando Valley News, Jan. 19, 1979:

> In a lopsided 31-5 vote, the Senate Thursday passed and sent a proposed constitutional amendment limiting court-ordered busing to the Assembly where the measure is expected to face a tougher test.
>
> * * *
>
> SCA 2. Robbins has claimed would bring a halt to the Los Angeles plan as well as a recommendation to the state courts to expand that program throughout much of Southern California.

47 Clk's. Tr. 14089; Los Angeles Examiner, Jan. 18, 1979:

> Robbins addressed his opponents' arguments saying white Anglo kids should not have to pay penance for sins committed in another era.

47 Clk's. Tr. 14090; San Diego Evening Tribune, Jan. 18, 1979:

> Sen. Alan Robbins D-Van Nuys, said his measure, proposed for the June 1980 state ballot, would bring an end to the $110 million, Los Angeles city schools program that involved busing about 44,000 children.
>
> * * *
>
> The measure, Robbins said, would force a rehearing of the **Crawford** case that resulted in the state court order in Los Angeles, and forced busing would not be allowed unless intentional segregation by a government body could be proved, which conforms to the federal court mandate.
>
> * * *
>
> Robbins also said passage of his measure would head off the controversial metropolitan plan to expand busing into Ventura, Orange, and parts of San Bernardino

counties at a cost of about $1.1 billion a year.

47 Clk's. Tr. 14092; San Diego Daily Times Advocate, Jan. 19, 1979:

> SCA 2. Robbins has claimed, would halt the Los Angeles busing plan as well as a recommendation to the state courts to expand that program to much of Southern California.

47 Clk's. Tr. 14093; Bakersfield Californian, Jan. 19, 1979:

> A constitutional amendment designed to overturn Los Angeles' court-ordered school integration plan was approved overwhelmingly by the state Senate Thursday.

47 Clk's. Tr. 14094; San Jose News, Jan. 19, 1979,

47 Clk's Tr. 14095; Berkeley Daily Independent and Gazette, Jan. 19, 1979; 47 Clk's. Tr. 14097; Richmond Independent and Gazette, Jan. 19, 1979:

Twice in two years, measures to sharply curb the power of California judges to integrate schools have died in the committee, one without coming to a vote.

But this year the Legislature's more conservative makeup and the possibility that the Los Angeles integration progarm could spread to nearby districts have given busing foes greater hope.

* * *

The Senate set the stage for the showdown Thursday by approving a constitutional amendment by Robbins that would require state courts to use U.S. Supreme Court standards in deciding whether schools should integrate.

The 31-5 vote marked the third time since 1977 that the Senate had approved such a measure, aimed primarily at overturning Los Angeles' massive busing program.

47 Clk's. Tr. 14099; Valley News, Feb. 6, 1979:

> Also, Robbins has said that he believes the amendment will result in a halt to the Los Angeles plan as well as the proposed metropolitan plan.
>
> If the measure ultimately clears the Assembly, Robbins has another bill pending calling for a special election on the issue prior to the start of next school year.

47 Clk's. Tr. 14101; Los Angeles Times, Feb. 22, 1979:

> Legislation intended to block a second year of court-ordered busing in Los Angeles city schools was approved Wednesday by the Senate Elections and Reapportionment Committee on a 4-2 vote.
>
> The bill by Sen. Alan Robbins (D-Van Nuys) would order a statewide special election on a proposed anti-busing constitutional amendment to be held Aug. 28, one week before the new school year starts.

47 Clk's. Tr. 14102; Valley News, March 11, 1979:

A Senate-passed constitutional amendment that sponsors claim will bring a halt to busing in Los Angeles faces perhaps its most crucial legislative burden this week.

The Assembly Judiciary Committee which twice before killed similar proposals, will be considering Senate Constitutional Amendment 2 (SCA 2) along with several other busing-related measures Wednesday.

* * *

If Robbins is able to qualify SCA 2 this year by either initiative or legislative action, it would be before voters in June, 1980.

But the Valley lawmaker has legislation pending that calls for a special election Aug. 28. That bill has passed the Senate Elections and Reapportionment Committee

and will be heard in Finance Committee after the vote on SCA 2.

As for the proposed constitutional amendment, Robbins has said SCA 2 will — if approved by voters — halt the existing busing plan in Los Angeles as well as the so-called Metropolitan Plan.

47 Clk's Tr. 14103; Valley News, March 14, 1979:

Supporters of various pending legislation — all designed to halt busing in Los Angeles — held separate Capitol news conferences to back the different measures.

* * *

SCA 2. Robbins' bill, has gone the farthest in the Legislature after two defeats in the Judiciary Committee last season.

* * *

Robbins also has pending legislation which calls for a special election for his and

other measures for Aug. 28, and prior to the start of school next year.

47 Clk's. Tr. 14104; Los Angeles Times, March 15, 1979:

The legislative bandwagon for a proposed constitutional amendment to stop mandatory school busing in Los Angeles and elsewhere rolled over its opponents again Wednesday, this time clearing the Assembly Judiciary Committee on a 10-2 vote.

* * *

But while several members wondered whether this amendment would accomplish its goals, only the two blacks on the committee — Assemblywoman Maxine Waters (D-Los Angeles) and Assemblyman Willie I. Brown Jr. (D-San Francisco) — voted against it.

After expected Senate concurrence in Assembly amendments, the measure would be ready for the ballot and would normally go

before voters in June of 1980. However, Robbins is also sponsoring a bill to require a special election next August, just before school begins.

Robbins has said that voter approval then would prevent the Los Angeles busing program from going into another year. However, the special election would be costly which could generate strong opposition before the Legislature's fiscal committees.

Through it all, Robbins has contended that his success this year was largely the result of proposals that Los Angeles be desegregated by a busing program that involved surrounding school districts.

At the Wednesday hearing he once again produced scores of supporters from surrounding areas who said they were backing the Robbins proposal because of opposition to the metropolitan plan.

47 Clk's Tr. 14105; Los Angeles Examiner, March 15, 1979:

> In another Robbins bill Aug. 28 is set as a date for a special election on the proposed amendment.
>
> Should that fail but the current measure be passed, voters would get a chance to act on the anti-busing proposal on the June, 1980 ballot.

47 Clk's. Tr. 14108; Los Angeles Herald Examiner, March 22, 1979:

> Anti-busing forces disputing charges of racism scored a breakthrough yesterday when the Assembly for the first time approved a state constitutional amendment restricting mandatory busing for integration.
>
> * * *
>
> Support for the measure was bipartisan and came mostly from representatives of the same middle-class residential areas that

spawned the tax revolt and Proposition 13 last year.

Their target is a court-ordered busing program that started in Los Angeles last fall and that could be extended by a judge to outlying, largely white suburban areas because of the city's declining number of white students.

* * *

Legislative passage of the measure normally would qualify it for the next scheduled statewide election, in June 1980. But Robbins wants a special election on August 28 so that busing might be stopped this fall, and has a bill in the Senate Finance Committee next Monday calling for such an election.

* * *

Robbins says his measure would stop mandatory busing in Los Angeles by

restricting court-ordered busing to cases of deliberate segregation by school districts.

* * *

"Court-ordered busing . . . is perhaps the most socially destructive and indefensible government policy of our time," said the measure's floor sponsor, Assemblyman Bruce Young, D-Cerritos, whose district would be affected if the Los Angeles program were extended to the suburbs.

On the other side, black Assemblyman Elihu Harris, D-Berkeley, said: "The issue is not the bus, It's us . . . The level of racial hostility in this society is not an accident. It is caused by these kinds of measures."

White Assemblyman Lawrence Kapiloff, D-San Diego, said a publicly supported San Diego busing program might be stopped by Robbins measure, which he called "racist on

its face," adding, "If I have to vote for bigotry, I don't want to be here."

* * *

"Its basically American to be racist and it's more American to deny it," said Assemblyman Willie Brown, D-San Francisco, chairman of the Black Caucus.

47 Clk's. Tr. 14108; Los Angeles Times, March 30, 1979:

In an easy victory for busing foes, the Senate set the stage yesterday for a potentially bitter ballot campaign aimed at overturning Los Angeles court-ordered school integration program. The upper house gave final legislative approval to a proposed constitutional amendment that would sharply restrict the power of California judges to integrate schools.

* * *

The amendment would normally go on the ballot for the June 1980 primary election,

but Robbins has a bill that would schedule a special election Aug. 28 to try to avoid a second year of mandatory busing in Los Angeles. That measure is awaiting a vote in the Senate Finance Committee.

* * *

Yesterday's vote ended a two-year legislative battle by Robbins against the Los Angeles program. Twice in the last two years similar amendments he authored died in an Assembly committee.

47 Clk's. Tr. 14109; Valley News, March 31, 1979:

Odds are against getting a proposed amendment aimed at halting mandatory busing on a special August ballot, state Sen. Alan Robbins, D-Van Nuys, conceded Friday.

That would stymie plans of Los Angeles anti-busing activists, who plan to use passage of the proposed amendment as ammunition in

an attempt to halt mandatory busing in the city schools before classes begin next September.

A bill calling for a special August election, SB 217, is pending before the Senate Finance Committee Monday. However, the seventh vote Robbins considers necessary for committee approval apparently slipped away this week when state Sen. John Nejedly, R-Contra Costa, suffered a heart attack.

* * *

Robbins said Friday in his Van Nuys offices he is "willing to compromise" on a November special election. Then legislators would have until late June to write their own spending limit measure.

* * *

If a November election were called, then mandatory busing in Los Angeles could be stopped at the end of the fall semester

next year, in January 1980, Robbins said.

47 Clk's. Tr. 14110; Valley News, April 3, 1979:

> The Senate Finance Committee Monday narrowly approved legislation establishing a special election Aug. 28 for proposed constitutional amendments, including a measure limiting court-ordered busing in California.
>
> * * *
>
> Robbins has been pushing for the special election for his proposed constitutional amendment (SCA 2) that restricts state court judges to the more limited federal guidelines when ordering busing.
>
> The Valley lawmaker contends that SCA 2 if approved by voters will result in a halt to busing in Los Angeles as well as the so-called proposed metropolitan plan.

Lawmakers already have approved placing SCA 2 on the ballot for the next general election, which is in June of 1980.

* * *

Robbins said after Monday's vote that he believes the Legislature will in fact order a special election, but now the question is when. He said the special election bill may be amended to establish it in November instead of August if major opposition develops or if he runs out of time.

47 Clk's. Tr. 14111; Los Angeles Times, April 3, 1979:

The Senate Finance Committee Monday approved legislation calling for a special statewide election in August that would allow voters to express themselves on a proposed antibusing amendment to the state Constitution.

At this moment, it is virtually certain that the ballot also would carry "The Spirit

of 13," a proposed amendment that would place a limit on state and local government spending.

The election bill was introduced by Sen. Alan Robbins (D-Van Nuys), whose antibusing amendment cleared the Legislature Thursday. Under current law, the amendment would not go before voters until the next regular statewide election in June, 1980.

However, Robbins who has no doubts that the amendment will pass, contends that a special election Aug. 28 — one week before the start of school — will give busing opponents the legal tools they need to prevent the Los Angeles school busing program from entering its second year.

Thus, he said, the state and city school district will save at least $45 million in

busing costs, more than off-setting the $11.9 million cost of an election.

The Robbins bill was approved on a 7 to 5 vote and went to the Senate floor.

The biggest factor now is time. For legal and political reasons the bill must be enacted by April 19 to assure that the election will take place in August.

* * *

If the task proves impossible, Robbins said, he will amend the measure to place the special election in November, 1979, allowing a halt to the Los Angeles busing program in January, 1980.

According to Robbins, the deadline for enacting a November election bill would be June 28, which, he said, he is sure he can meet.

47 Clk's. Tr. 14114; Valley News, April 25, 1979:

OPPORTUNITY FADES FOR

AUGUST BUSING ELECTION

* * *

On the other hand, Robbins has claimed the sooner his amendment is voted on and approved by California the sooner busing can be brought to a halt in Los Angeles.

47 Clk's. Tr. 14115; Los Angeles Herald Examiner, May 4, 1979:

Robbins has a proposed constitutional amendment that would bar California judges from ordering schools to integrate unless they find evidence of intentional segregation.

The measure, aimed primarily at overturning the court-ordered integration program in Los Angeles, has qualified for the June 1980 ballot.

It would go on a special state wide ballot on November 6 if Robbins' bill becomes law. That bill, which supporters hope will end Los Angeles' program a semester early, is awaiting action in the Assembly.

47 Clk's. Tr. 14116; Los Angeles Times, May 4, 1979:

Robbins' bill would call a special statewide election Nov. 6 on a proposed constitutional amendment designed to stop the mandatory school busing program currently under way to Los Angeles.

47 Clk's. Tr. 14117; Los Angeles Times, May 12, 1979:

Gov. Brown disappointed school busing foes Friday by announcing that he will not call an Aug. 26 special election on the busing and government spending issues.

The busing foes had hoped that an election victory, one week before the opening of school, might allow them to stop

mandatory busing in Los Angeles from going into its second year.

However, said Gray Davis, Brown's executive secretary, "The Legislature is the best forum to determine the timing of this election."

At the moment, a bill is moving through the Legislature to hold the election Nov. 6. Davis declined to say what Brown will do if the measure should reach his desk.

At the election, voters would be presented with two major issues.

— A proposed amendment to the state Constitution designed to stop state courts from ordering busing in public school desegregation cases. Approved by the Legislature in March, it was carried by Sen. Alan Robbins (D-Van Nuys), who is also carrying the special election bill.

* * *

Normally, both measures would go before voters at the general election in June, 1980, but a legislative bill or gubernatorial proclamation could set a special election before then.

* * *

The Robbins amendment would require state courts to follow federal rules in desegregation cases. According to Robbins, the federal rules are more stringent concerning busing and the Los Angeles program would be stopped.

* * *

Robbins predicts that voters will overwhelmingly approve the amendment. A victory in August, he has said, would allow an immediate legal challenge of the Los Angeles program, thus preventing its beginning a second year.

47 Clk's. Tr. 14118; Los Angeles Times, June 19, 1979:

"This is the second symbolic means to separate the races in this state," declared black Assemblyman Willie I. Brown Jr. (D-San Francisco).

* * *

"The first, he said, is the proposed constitutional amendment," also authored by Robbins, that would appear on the Nov. 6 ballot and is designed to stop the mandatory busing program currently under way in Los Angeles.

* * *

Both the busing amendment and the Gann initiative were scheduled for the general election ballot in June, 1980. However, busing foes wanted an earlier election in hopes of stopping the Los Angeles program in the middle of next year.

* * *

The special-election bill was approved in the Senate April 27. Initially, Robbins had planned to follow the Assembly vote Monday by returning the measure to the Senate at once for concurrence in Assembly amendments. Thus the bill would have won final legislative approval and have gone to the governor.

47 Clk's. Tr. 14119; Los Angeles Herald Examiner, June 19, 1979:

The California Assembly approved a special statewide election Nov. 6 on anti-busing and government spending limit measures yesterday then heard a lecture from the Rev. Jesse Jackson on the evils of racism.

* * *

The constitutional amendment, which would ban court-ordered busing except in cases of deliberate segregation, is designed

to halt the busing program that started in the Los Angeles Unified School District last fall.

* * *

Robbins also predicted an end to busing in Los Angeles by January, though his measure could be delayed by a court challenge.

47 Clk's. Tr. 14120; Los Angeles Times, June 21, 1979:

California lawmakers sent Gov. Brown the controversial special election bill Wednesday, which he may sign to satisfy busing foes and conservatives or veto to satisfy many blacks and liberals.

The bill calls for a statewide election Nov. 6 to present voters two major measures.

— A proposed constitutional amendment designed to stop court-ordered busing for school desegregation in Los Angeles and elsewhere.

* * *

The bill was authored and assiduously pushed through the Legislature by Sen. Alan Robbins (DVan Nuys), who also authored the proposed antibusing amendment.

* * *

Robbins, confident that his antibusing amendmnt will be approved, said that a special election in November instead of June would allow an earlier start of a new legal battle against the Los Angeles program.

47 Clk's. Tr. 48121; Los Angeles Examiner, June 21, 1979:

That measure, SCA 2, already passed by the Legislature, is aimed primarily at overturning court-ordered busing in Los Angeles, where Robbins contends there is no intentional segregation.

* * *

Both proposals would appear on the June 1980 ballot without a special election, but SCA 2 supporters hope approval of their measure in November will avoid another semester of Los Angeles busing.

47 Clk's. Tr. 48123; Valley News, July 4, 1979:

The Van Nuys Democrat [State Sen. Alan Robbins] insisted that recent U.S. Supreme Court busing orders do not render his amendment meaningless, as some have claimed, but was not willing to unequivocally state it would halt busing in Los Angeles as he did early in the legislative campaign to qualify the measure for the ballot.

* * *

Robbins admitted no anti-busing ballot measure in the country had ever stood up in court or ever actually stopped busing, but said the Los Angeles situation is unique

because the desegregation order is based on the state rather than federal Constitution.

* * *

Robbins, however, insisted that the application of federal integration standards over state can still end the busing burden in Los Angeles, or at least reduce it.

47 Clk's Tr. 14126; Los Angeles Examiner, September 5, 1979:

Busing foes scored a last-minute victory last night when the Senate reversed itself and approved a bill aimed at throwing another roadblock in the way of Los Angeles school integration program.

* * *

The bill, SB 1244 by Sen. Alan Robbins, D-Van Nuys, would prevent a state court from shifting the burden of proof from pro-integration groups to the school district in a school integration case.

* * *

It is a companion measure to a constitutional amendment on the Nov. 6 special election ballot that would require a state court to find intentional segregation before ordering schools to desegregate.

The ballot measure also sponsored by Robbins is aimed primarily at overturning Los Angeles' year old court-ordered busing program.

47 Clk's. Tr. 48 14127; Valley News, September 1, 1979:

State Sen. Alan Robbins, D-Van Nuys, Friday released an opinion from a private law firm which concludes that his anti-busing stateconstitutional amendment would help stop mandatory busing of school children in Los Angeles.

* * *

The legal opinion concludes that the Robbins amendment would make "significant

changes" in the power of California courts to order mandatory busing and in the future of the Los Angeles desegregation case.

47 Clk's. Tr. 14129; Madera Tribune, Oct. 2, 1979:

The main committee supporting the anti-busing measure, Proposition 1, reported raising only $77,564 and spending $85,203, leaving it with a $7,639 deficit.

The measure, a constitutional amendment by state Sen. Alan Robbins D-Van Nuys, is aimed primarily at overturning Los Angeles' massive school integration program now in its second year.

47 Clk's Tr. 14130-132; Fresno, Modesto, Sacramento Bees Editorial, Oct. 14, 1979:

The amendment, sponsored by Sen. Alan Robbins of Van Nuys, is obviously designed to end busing for integration in Los Angeles.

* * *

> [A]ny vote to restrict the power to bus is at least an indication that society is giving up on the principle of integration, that the ideal is no longer worth the trouble, and that what began so hopefully more than 25 years ago with the **Brown** decision is now at an end. Proposition 1 does not replace one remedy with another, it offers no new strategy, no new hope, no promise. If it passes, it will simply be a declaration that, for the moment at least, it's all over.

47 Clk's. Tr. 14133-134; San Francisco Chronicle, Oct. 15, 1979:

> Prop. 1 was drafted to stop L.A.'s court-ordered busing by forbidding state judges in California from being any stricter in their integration orders than are federal judges.
>
> * * *
>
> Ironically, it was the threat of this "metropolitan" plan that led to Prop. 1.

Robbins had tried to get such a measure through the Legislature before and failed. He tried an initiative and also failed. But when legislators from surrounding districts saw that their constituents may be drawn into the plan the tide dramatically shifted and Robbins pushed his measure through the Legislature.

Moreover, he and Republican Lieutenant Governor Mike Curb successfully secured Governor Brown's approval for a statewide special election for November — instead of the regularly scheduled June, 1980 election — to speed up the vote on Prop. 1.

47 Clk's. Tr. 14135; Santa Rosa Press Democrat, Oct. 17, 1979:

Proposition 1 springs from the widespread discontent with the integration plan now in its second year in the Los Angeles Unified School District. While much

of the Los Angeles busing plan involve transportation of students over distances that are not uncommon in districts where there is no integration order, some students are being bused from the largely minority areas of south and central Los Angeles into the largely white San Fernando Valley.

And that busing is the driving force behind the supporters of Proposition 1.

47 Clk's. Tr. 14136; Los Angeles Herald Examiner, Oct. 1979:

Robbins said that despite what he perceives as strong support for Proposition 1, designed to end courtordered busing in Los Angeles city schools, he will have to scramble for donations if he is to present his case on television.

47 Clk's. Tr. 14138; San Diego Union, Oct. 24, 1979:

Robbins insists that approval of his measure will help stop the extensive court-

ordered integration program now under way in Los Angeles which includes busing school children between the mostly black south Los Angeles communities and the largely white San Fernando Valley. He said the proposition also would prevent the state courts from ordering an integration program that would involve the school districts surrounding the sprawling Los Angeles district.

47 Clk's. Tr. 14139; San Diego Evening Tribune Editorial, Oct. 25, 1979:

The measure is aimed frankly at upsetting court-ordered busing in Los Angeles, which includes Robbins' district.

* * *

Above all, approval of the proposition would stir doubts as to California's committment to equal educational opportunity in the public schools.

47 Clk's. Tr. 14146; El Cajon Californian, Oct. 26, 1979:

> Robbins authored the measure because he believed its passage would halt court-ordered busing in the Los Angeles school system.
>
> * * *
>
> Historically California voters have supported measures tainted by racial overtones such as the 1972 busing initiative which was declared unconstitutional.

47 Clk's. Tr. 14141; Oakland Inter-City Express, Oct. 30, 1979:

> S.F. BAR ASSOCIATION
>
> OPPOSES PROP. ONE
>
> Thomas F. Smegal, Jr., President of the Bar Association of San Francisco, announced recently that the Association's Board of directors had voted unanimously to oppose

Proposition One — the statewide anti-integration, antibussing initiative which will appear on the November 6th ballot.

Smegal stated that it was the opinion of the Bar's Board of Directors that this attempt to circumvent the court-ordered desegregation plan now in effect in Los Angeles is an unwise method of dealing with citizen opposition to such school desegregation rulings of the California courts, is primarily politically motivated, and would cost taxpayers thousands of dollars during subsequent court challenges.

47 Clk's. Tr. 14142; San Francisco Chronicle, Oct. 30, 1979:

In arch-conservative Orange County, some sample ballots were shown to potential voters. The ballot read Proposition 1 "School Assignment and Transportation of Pupils."

In stunning numbers, the voters didn't like what they saw. "Forced school busing," they said. "We're against that, we'll vote 'no'".

This is the story being spread with alarm by Senator Alan Robbins, D-Van Nuys, Proposition 1's author, who got the Legislature to call next Tuesday's special election to decide its fate.

Robbins says he is worried by the Orange County survey because Proposition 1 is supposed to be an anti-busing measure. Voters, he says, are confused by the wording on the ballot title and may think that a "yes" vote is for busing.

* * *

Robbins designed his proposition to stop busing in Los Angeles.

47 Clk's. Tr. 14144; Fresno Bee, Nov. 1, 1979:

"Forced busing not only doesn't work, its counterproductive," he [Sen. Robbins] said, employing the phrase "forced busing" again as he did throughout the news conference.

Isn't that a buzzword? he was asked. "Yes," he admitted. "That's why we use it."

In fact, he would have preferred the phrase to be the one on the ballot in place of "School Assignment and Transportation of Pupils." That, and the rest of the ballot statement, Robbins has complained, could confuse supporters of the anti-busing measure into voting against it.

At his request, Secretary of State March Fong Eu issued a statement Tuesday saying "a 'yes' vote on Prop. 1 is a vote against court-ordered busing of school children".

Even though the "clarification" cannot be on the ballot, it will help, said Robbins, who has been concerned not only about confusion but about voter apathy as well.

Attorney General George Deukmejian also issued a statement at his request, saying that "persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Prop. 1 and are asking for a 'yes' vote.["]

Robbins, who authored the proposition to stop busing in Los Angeles, warned that if the measure is defeated the cost of the program will be paid by taxpayers throughout the state, not only those in Los Angeles.

* * *

He said he is just as certain that it will be held constitutional and will become

effective by next September, in time to end the Los Angeles busing program.

47 Clk's. Tr. 14145; Santa Barbara News Press Commentary, Nov. 1, 1979:

> The anti-busing proposition originated in Los Angeles, where thousands of Anglo families had left inner-city neighborhoods largely to avoid close contact with minorities. Because the city's boundaries are so far-flung though they remained in the Los Angeles school district and their children are being dragged back into the inner city by court-ordered busing. In other cities with smaller boundaries, whites who left for the suburbs have had no such troubles.
>
> * * *
>
> But as in most issues, numbers will decide who wins. And Anglos make up the vast majority of California voters. They'll pass both the major propositions because

they believe it's the only way to prevent government from thwarting their wishes.

47 Clk's. Tr. 14146; Riverside Press, Nov. 5, 1979:

Prop. 1, sponsored principally by state Sen. Alan Robbins, D-Van Nuys, concerns largely the Los Angeles area.

* * *

White middle-class parents are expected to turn out heavily to vote for Prop. 1. Many, but not all, black leaders and activists are urging that it be voted down.

48 Clk's. Tr. 14147; San Jose Mercury, Nov. 7, 1979:

Robbins, who has battled to stop court-ordered busing now in its second year in Los Angeles, claimed victory in all of the state's 58 counties.

Miller Recall

48 Clk's. Tr. 14195; Valley News, Feb. 22, 1979:

San Fernando Valley anti-busing activists Wednesday filed petitions bearing 72,000 signatures to recall Los Angeles Board of Education president Howard Miller, but it appears more signatures will be necessary.

Recall leader Roberta Weintraub of Sherman Oaks said Miller should be ousted because he posed as an opponent of busing to get elected to the board and then turned around and backed the district's mandatory student integration program.

"He lied to deceive people on the issue of busing," she said as she filed the cartons of petitions at the city clerk's office at Los Angeles City Hall.

Mrs. Weintraub said she will run against Miller if the recall qualifies.

Miller later predicted the recall attempt would fail and accused Mrs. Weintraub of "wasting the taxpayers' time."

The school board president told reporters busing is mandated by the courts and is out of the board's hands. His earlier anti-busing statements were made before the integration court order "when the law of the land was not clear."

"I don't think a recall is called for against a public official who has just obeyed the law." Miller said.

48 Clk's Tr. 14192; Los Angeles Herald Examiner, March 21, 1979:

The petition campaign for recall of Miller succeeded in gathering the required number of valid signatures of registered voters, City Clerk Rex Layton announced late yesterday. His office stopped counting

when the necessary 65,923 signatures had been logged.

The City Council will be asked today to certify that the recall has qualifed for the ballot at the May 29 municipal election, Layton said.

Miller has been head of the board of the Los Angeles Unified School District for 21 months. The recall effort was based on Miller's support of court-ordered mandatory busing of students to achieve racial integration.

48 Clk's. Tr. 14192; Los Angeles Times, March 21, 1979:

MILLER WILL FACE RECALL ELECTION

BUSING FOES SUCCEED IN FORCING

MAY DECISION

* * *

Los Angeles school board President Howard Miller, who played a key role in bringing court-ordered desegregation to the

city schools, must face a recall election in May.

City Clerk Rex Layton announced Tuesday that a campgain led by antibusing activist Roberta Weintraub had succeeded in gathering the required number of valid signatures on recall petitioners.

* * *

Miller has been president of the board for the last 21 months, during which the school system embarked on court-ordered desegregation, and Miller in many ways has become a symbol of that effort. Mrs. Weintraub of Encino ran unsuccessfully for the school board two years ago on an antibusing platform and is expected to be Miller's leading challenger at the May 29 election.

* * *

48 Clk's Tr. 14192-3; Los Angeles Times, March 25, 1979:

> Miller was elected president of the board shortly after his election in 1977. He was reelected for a second consecutive one-year term as president last July, a rarity on the board.
>
> During this time, the board was confronted with court-ordered desegregation, and it fell to Miller as president to announce, explain or defend the board's response to the mandate.
>
> * * *
>
> In a Times article of April 4, 1976, Miller argued that busing would not work in Los Angeles. That, Miller said, was before the California Supreme Court ordered Los Angeles to desegregate.
>
> "Once that decision came down, my position was the court had ruled," Miller

said. "Under those circumstances, while we would all prefer to live in a city where busing was not required, the court had ruled, in effect, busing was required in Los Angeles."

* * *

Mrs. Weintraub also said Miller's recall would signal to the courts and legislators the depth of public feeling against busing and help the case against busing in those arenas.

"We have a situation where you have a ripple effect among politicians," she said. "Judges are not immune to ripple effects . . . I think the cumulative effect of recalling a person who has advocated a massive forced busing program . . . would have a tremendous impact. Everybody looks to the political winds. It's all of a sudden very popular to become a tax-cutter (and) very unpopular to become a pro-buser.

So, yes, Howard Miller's recall will definitely help stop busing."

Miller said he made clear during the campaign that he did not rule out the possibility of busing and that is why antibusing forces ran Daniel Danko against him. "I have always said that the law would have to be upheld and conflict avoided," even if that required some busing, he added.

48 Clk's. Tr. 14185; Los Angeles Times Editorial, May 13, 1979:

Clearing the main issue — the reason Miller is up for recall at all — is busing. Miller tried to obey the law when he led the board to adopt a limited busing plan that its majority hoped would work.

* * *

There is more at stake in this election than busing, however.

* * *

> Miller's opponents focus on one issue, they present a narrow outlook. They do not honor our city's diversity. Believing in tolerance and decency, Los Angeles can only vote NO on recalling Miller.

48 Clk's. Tr. 14180; Los Angeles Herald Examiner, Commentary by Los Angeles Board of Education member Bobbie Fiedler, May 25, 1979:

> The whole question of the recall boils down to a referendum on busing and integrity in government. A "yes" vote means that you want to stop busing and remove a deceitful politician from office. A "no" vote means that you want to continue forced busing and you believe in deceitful politics.

48 Clk's. Tr. 14174; Los Angeles Examiner, Editorial, May 27, 1979:

> On the ballot, you'll be asked whether Howard Miller, the president of the Los Angels Board of Education, should be

recalled from office. We say YES. The issue of busing now transcends the man. Los Angeles should make its will very sharply known.

48 Clk's. Tr. 14170; Los Angeles Times, May 30, 1979:

VOTERS OUST MILLER FROM SCHOOL BOARD

Roberta Weintraub, Recall Organizer, Wins Race for His Seat by Wide Margin

* * *

Mrs. Weintraub had insisted from the beginning that "the recall of Howard Miller is, everyone agrees, a referendum on forced busing," while Miller tried hard to argue that in voting for the present busing plan, he had simply obeyed the law, and should not be recalled for taking an unpopular stand.

48 Clk's. Tr. 14167; Los Angeles Times, Editorial, May 31, 1979:

> Yes, Tuesday's election that recalled Howard Miller was indeed a referendum on busing. In the process, the Los Angeles Board of Education lost its president, a decent man trying to do what he thought was right to obey the law.

BALLOT PAMPHLET DISTRIBUTED TO VOTERS FOR THE NOVEMBER 7, 1979 ELECTION
[48 C.T. 14266-14269]

SCHOOL ASSIGNMENT AND TRANSPORTATION OF PUPILS

Official Title and Summary Prepared by the Attorney General

SCHOOL ASSIGNMENT AND TRANSPORTATION OF PUPILS LEGISLATIVE CONSTITUTIONAL AMENDMENT. Amends Section 7(a) of Article I of the Constitution to provide that nothing in the California Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the United States Constitution with respect to the use of pupil school assignment or transportation. Provides for modification of existing judgments, decrees, writs or other court orders to conform to the provisions of this subdivision. Provides that governing boards of school districts may voluntarily continue or commence a school integration plan. Financial impact:

Indeterminable. Potential savings if school districts elect to reduce or eliminate pupil transportation or assignment programs as a result of this measure.

FINAL VOTE CAST BY LEGISLATURE ON SCA 2
(PROPOSITION 1)

Assembly—Ayes, 62	Senate—Ayes, 28
Noes, 17	Noes, 6

Analysis by Legislative Analyst

Background:

The U.S. Supreme Court has interpreted the U.S. Constitution to require public school desegregation only when the segregation was caused by government action with a discriminatory intent. The California Supreme Court has interpreted the State Constitution to require that public school segregation be alleviated regardless of what caused the segregation. Thus, the State Constitution now requires public school

desegregation in cases where the U.S. Constitution does not.

Currently, there are many California school districts which are providing pupil transportation and/or assigning pupils to schools outside of their immediate neighborhoods in order to alleviate segregation. Other school districts are currently involved in court actions concerning desegregation, and still others could become involved in court actions at some time in the future.

Some school districts have started desegregation plans because of federal court orders or because of agreements with the U.S. Office of Civil Rights. Other school districts are carrying out desegregation plans because of California court decisions. A third group of school districts is implementing desegregation plans on a voluntary basis.

Proposal:

This proposition would limit the power of California courts to require desegregation. Specifically, desegregation could be required only in cases where the U.S. Constitution would require it. As a result, the proposition could affect 13 school districts which now have desegregation plans ordered or approved by a California court plus other school districts that are involved or could become involved in desegregation actions before California courts.

This measure has four major provisions. First, it would require California courts to follow applicable federal court decisions when deciding if changes in pupil school assignment or pupil transportation are required to alleviate segregation. Consequently, if a California school district is found to have segregation for reasons other than government action with a discriminatory intent, the proposition would prohibit a California court from ordering the school district to

start a pupil school assignment or pupil transportation desegregation plan.

Second, the proposition would make past California court decisions requiring desegregation through changes in pupil school assignment or pupil transportation subject to court review using the same standards applicable to the federal courts. Any person could request a court to review its prior decision that resulted in a pupil school assignment or pupil transportation plan. The court would then have to reconsider its prior decision, and if necessary issue a new ruling based upon the California Constitution as amended by this proposition.

Third, the proposition would require California courts that are asked to review their prior decisions to give first priority to such a review relative to other civil cases.

Fourth, public schools would be allowed to continue current desegregation plans and start new desegregation plans on a voluntary basis.

Fiscal Effect:

The proposition would have an unknown fiscal effect. It would not require any school district to stop or reduce current busing programs. Thus, it would not necessarily affect school district costs. However, because review of current court-ordered busing programs, as permitted by the proposition, might result in some of these programs being modified to require less busing, the proposition could result in significant savings to the state and school districts. The savings would then occur, however, if school districts chose to eliminate or reduce their current busing programs based on new court decisions. Additional state and local costs would result from court review of existing court decisions, and these costs would offset some portion of any savings that might occur due to decreased busing.

Therefore, the net fiscal impact of this measure could range from a net increase in state and local

government costs (if no districts chose to reduce or eliminate pupil transportation programs) to significant net savings (if many districts reduce or eliminate these programs).

Text of Proposed Law

This amendment proposed by Senate Constitutional Amendment No. 2 (Statutes of 1979, Resolution Chapter 18) expressly amends an existing section of the Constitution; therefore, new provisions proposed to be inserted or added are printed in italic type [underscored herein] to indicate that they are new.

PROPOSED AMENDMENT TO
ARTICLE I

Subdivision (a) of Section 7 is amended to read:

(a) A person may not be deprived of life, liberty,

or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such

party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

Arguments in Favor of Proposition 1

CURRENTLY, THE CALIFORNIA CONSTITUTION CAN BE INTERPRETED TO REQUIRE COMPULSORY BUSING, INCLUDING METROPOLITAN COMPULSORY BUSING, IN CIRCUMSTANCES WHERE BUSING WOULD NOT BE REQUIRED BY THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

THE INTENT AND PURPOSE OF MY AMENDMENT IS TO PROHIBIT ANY CALIFORNIA JUDGE FROM ORDERING MANDATORY BUSING UNLESS THE BUSING IS REQUIRED BY FEDERAL LAW. This amendment is based on the conclusion that forced busing is not a useful tool in achieving desegregration because its financial and education costs render it counterproductive.

COURT-ORDERED COMPULSORY BUSING HAS BECOME PART OF THE PROBLEM RATHER THAN PART OF THE SOLUTION. The racial tension and strife of compulsory busing is counter-productive to our goal of maximum racial harmony, and the furor

over compulsory busing stands in the way of community support for voluntary integration. By adopting this amendment, we will allow our courts and local school officials to turn to other more appropriate solutions.

ON TUESDAY, NOVEMBER 6, PLEASE JOIN ME IN DOING EVERYTHING THAT WE LEGALLY CAN TO HELP STOP COMPULSORY BUSING. PLEASE VOTE YES ON PROPOSITION 1.

ALAN ROBBINS
State Senator, 20th District

One of the great myths of our society is that blacks and other minority children can only receive an effective and equal education through the use of forced busing programs. This is simply not true. The use of forced busing hinders voluntary integration participation and other steps which could improve the quality of education available in our schools.

AS MAYOR TOM BRADLEY HAS SAID, "MOST PARENTS, WHATEVER THEIR COLOR, WHATEVER THEIR BACKGROUND, WHEREVER THEY LIVE,

DON'T WANT THEIR KIDS TRANSPORTED BACK AND FORTH ACROSS THE CITY."

Norman Cousins, the respected editor of Saturday Review and a strong supporter of integration, said a few years ago:

"The evidence is substantial that busing is leading away from integration and not toward it, that it has not significantly improved the quality of education accessible to blacks . . . that it has resulted in the exodus of white students to private schools inside the city or to public schools in the comparatively affluent suburbs beyond the economic means of blacks; and finally, that it has not contributed to racial harmony but has produced deep fissures within American society."

As a black parent and minister who cares about children, I urge you to help end forced busing in California by voting YES on the Robbins Amendment.

REV W. C. JACKSON
Pastor, Beth Ezel Baptist Church, Watts

As the plaintiff in **Serrano v. Priest,** I have worked to insure equal education opportunity for all California children. The excessive use of court-ordered forced busing will not guarantee this result.

FORCED BUSING TO ACHIEVE INTEGRATION IS A SHAM. TO FORCE A CHILD TO SPEND THREE HOURS ON A BUS AND FIVE HOURS IN A CLASS DOES NOTHING MORE THAN CHANGE THE COLOR BALANCE OF A FEW SCHOOLS FOR A FEW HOURS.

Children would be better off if we spent these dollars on teachers and buildings rather than wasting it on compulsory busing.

ON NOVEMBER 6, I WILL CAST MY VOTE IN FAVOR OF EQUAL, QUALITY EDUCATION—I WILL VOTE YES ON PROPOSITION 1.

JOHN SERRANO, JR.
Plaintiff, **Serrano v. Priest**

Rebuttal to Arguments in Favor of Proposition 1

1. Busing will NOT come to a halt if Proposition 1 is passed.
2. Proposition 1 will NOT prevent metropolitan integration.
3. Proposition 1 will NOT release money for classroom use in Los Angeles.

Proposition 1's proponents would have you believe that the issue is busing, that amending the California Constitution will stop so-called compulsory busing, and that busing cannot be required under the U.S. Constitution.

Proponents hold up the specter of metropolitan busing, implying that Proposition 1 would block such a plan in Los Angeles and other California metropolitan areas.

Just this year the U.S. Supreme Court approved sweeping compulsory desegregation plans in which federal courts required metropolitan busing. Thus,

federal standards may impose broader rather than narrower duties to desegregate.

Proponents complain of the excessive cost of busing under the existing Los Angeles integration order. But, in fact, under a metropolitan plan, busing would cost less and children would spend less time traveling to and from school than some children spend under the current plan.

Since 1954, selfish and shortsighted persons who were responsible for the building of schools and housing in communities throughout California have refused to plan and implement long-term solutions which could have effected integration WITHOUT busing.

Until thoughtful planning for school locations and metropolitan zoning and intelligent housing programs are implemented, busing is one of the only tools we have to provide equal education opportunity.

WE URGE YOU TO VOTE NO ON PROPOSITION 1.

DIANE E. WATSON
State Senator, 30th District

TERESA P. HUGHES
Member of the Assembly, 47th District

SUSAN F. RICE
President
League of Women Voters of California

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency

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Arguments Against Proposition 1

Contrary to the promises made by the Amendment's supporters, neither desegration in Los Angeles, nor the busing used as a tool to achieve it, would come to a halt with the passage of this measure.

In the Los Angeles school integration case, the trial court found—and the State Supreme Court agreed—that the segregation resulted from official acts of the school board. Even if the California

Constitution were to be amended to make the so-called Federal standard on desegregation apply in California, de jure (i.e.: intentional) segregation would still require a remedy not only in Los Angeles but in other school districts all over the state.

There is good reason to believe that Proposition 1 will ultimately be declared unconstitutional, since its very enactment could be interpreted to be de jure (intentional) segregation. The backers of Proposition 1 have made it clear in public statements that it is their intention in seeking this amendment to thwart the court's mandate to desegregate the schools in Los Angeles.

The right of every citizen to equal protection of the law, currently guaranteed by our strong California Constitution, is effectively diluted by Proposition 1. The Tenth Amendment to the U.S. Constitution expressly reserves to the States power to establish greater Constitutional protections for their citizens than those provided by the U.S. Constitution.

Proposition 1 drastically weakens the California Constitution's protection of minority students and their right to equal educational opportunity, consigning a generation of minority children to segregated inferior schools.

The campaign in favor of this amendment has played on fears and stirred up racial hostilities. If enacted, it will be a signal to all citizens of California that the state is on the side of prejudice, not equality. By making it possible to reopen cases in districts presently under California court order, the amendment would further generate disruption and turmoil where progress is being made toward desegregation.

Quality education should be available to all the students of our state; it cannot be achieved in a segregated setting. School districts should be encouraged and committed to making education a realistic experience, as we live in an integrated society. But passage of this amendment effectively

prevents our school system from preparing our children to function in the real world.

In short, the enactment of this proposition will not deliver what its proponents have promised: the blocking of court-ordered school desegregation in Los Angeles. It will make the state a party to discrimination; it will increase racial conflict; it will restrict educational opportunities for school children; it will touch off a series of costly court battles; and it will set a precedent of altering the California Constitution for political gain.

We urge voters to vote "NO" on Proposition 1.

DIANE E. WATSON
State Senator, 30th District

TERESA P. HUGHES
Member of the Assembly, 47th District

SUSAN F. RICE
President
League of Women Voters of California

Rebuttal to Argument Against Proposition 1

THE ROBBINS AMENDMENT HAS BEEN VERY CAREFULLY DRAFTED TO WITHSTAND ANY CONSTITUTIONAL CHALLENGE AND TO STOP COURT-ORDERED FORCED BUSING IN CALIFORNIA. That is what it is designed to do, and that is all it will do.

The opponents of Proposition 1 argue that it will cause segregation and reduce the quality of our schools. In fact, it will do just the opposite.

The Robbins Amendment will assure quality education for the children of California. IT WILL PUT MONEY WHERE IT IS NEEDED—INTO SCHOOLS, TEACHERS AND BOOKS—NOT INTO BUSES, GAS AND BUS DRIVERS.

Forced busing has not eased racial tension, it has not stopped discrimination, and it has not improved the

quality of education. It merely forces large numbers of children to take long daily bus rides.

THE SCOPE OF OUR AMENDMENT IS LIMITED TO THE PROBLEMS CAUSED BY COURT-ORDERED BUSING. It makes no attempt to interfere with the prerogatives of local school districts and does not diminish their obligation to provide minority students with equal educational opportunities.

By ending the use of court-ordered forced busing, unless such busing is required by the U.S. Constitution, Proposition 1 does everything the people of California may legally do to stop court-ordered forced busing in Los Angeles and in all other California school districts. That is one reason why the California P.T.A. has urged the adoption of this type of amendment.

When you vote on the 6th of November, please vote YES on Proposition 1, the Robbins Amendment, and help end forced busing in California.

ALAN ROBBINS
State Senator, 20th District

REV. W. C. JACKSON
Pastor, Beth Ezel Baptist Church, Watts

JOHN SERRANO, JR.
Plaintiff, **Serrano v. Priest**

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

CALIFORNIA ATTORNEY GENERAL PRESS RELEASE DATED OCTOBER 30, 1979
[48 C.T. 14160]

DEPARTMENT OF JUSTICE
Office of the Attorney General
GEORGE "DUKE" DEUKMEJIAN
555 Capitol Mall, Suite 350
Sacramento, CA 95814

Contact: Tony Cimarusti
(213) 736-2298
Release: October 30, 1979

STATEMENT BY ATTY. GEN. GEORGE "DUKE" DEUKMEJIAN CONCERNING PROPOSITION 1

It has come to my attention that there may be some confusion over the meaning of the vote on Proposition 1 on the Nov. 6 ballot.

I would like to make this clarification:

The persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 and are asking for a "yes" vote.

The persons and organizations who favor busing to achieve racial integration in the schools are generally against Proposition 1, and are asking for a "no" vote.

The ballot title and summary which were developed by my office were designed to be impartial and to fairly summarize the proposition. While I am convinced that this aim was achieved, I am making this statement in an attempt to help voters avoid any confusion on this sensitive issue.

I urge voters to study their ballot pamphlets before they go to the polls on Nov. 6. For anyone who still is not sure, there will be ballot pamphlets available for review at each polling place.

Finally, I urge everyone who is registered to utilize their constitutional right and to vote on election day.

CALIFORNIA SECRETARY OF STATE PRESS RELEASE DATED OCTOBER 30, 1979
[48 C.T. 14161]

NEWS RELEASE
from: Secretary of State March Fong Eu
1230 J Street, Sacramento, CA 95814
(916) 445-6371

For Immediate Release

Contact: Caren Daniels

October 30, 1979

SECRETARY OF STATE MARCH FONG EU
CLARIFIES BALLOT MEASURE

SACRAMENTO — Secretary of State March Fong Eu today (October 30) urged all registered voters in California to study their ballot pamphlets and other official election materials before going to the polls next Tuesday, November 6.

"Such careful study is especially important in those counties which employ punch card voting system," Ms. Eu said, "because most of those counties will feature the shorter version of the official title and summary on their ballots."

Eighty-seven percent of the state's registered voters will see the shorter title and summary on their ballots.

Proponents of Prop. 1 have indicated to me that a reading of the shorter version of the ballot title and summary relating to Prop. 1 may confuse the voter," Ms. Eu said. "Lest there be doubt, the intent of the proponents of Prop.1 is to limit court-ordered busing of school children in California."

A "yes" vote on Prop. 1 is a vote against court-ordered busing of school children. The opponents of Prop. 1 argue in the ballot pamphlet that, among other things, "busing is one of the only tools we have to provide equal educational opportunity."

"Historically, there have been measures on the ballot which, should you vote 'yes' you are really voting against something, and should you vote 'no' you are voting in favor of something," Ms. Eu said. "This is the case with Prop. 1."

Ms. Eu explained that ballot pamphlets will be available in all polling locations and that the long version of the ballot measure title and summary is required to be posted in all polling booths in punch card counties which employ the short version on their official ballots.

COMMUNICATION FROM SENATOR ALAN ROBBINS
[48 C.T. 14150-14157]

Senator Alan Robbins

Californians Against Forced Busing

Dear Opponent of Forced Busing:

If you believe that forced busing of school children is a good idea, throw this letter away right now, it doesn't concern you.

This letter and questionnaire are for opponents of forced busing only. To reply to the enclosed questionnaire you must certify that you are an opponent of the force busing of school children.

If you oppose forced busing, as I do, then I need your help immediately.

Californians will be voting on November 6th in a statewide election on my constitutional amendment against the forced busing of our school children.

As the author of this constitutional amendment, I need your advice now on how best to conduct our campaign. I know that the social planners will spend millions of dollars to promote forced busing and defeat my amendment.

Our pro-busing opponents have been given a free hand by California's judges to implement their misguided social plans. Recent rulings say children may be bused across school district lines, even county lines, to achieve a racial balance! I think the courts have gone too far.

If my constitutional amendment is adopted by the voters this November, this nonsense will end. State judges will never again be able to use the California Constitution as their justification for the forced busing of our school children.

Why do I need your help now?

> Because there are so many arguments against the forced busing of school children that it is difficult to decide which issues to campaign on . . . which issues concern you most. That's why I am asking for your help now.

Enclosed you will find a Questionnaire asking for your opinion on how our campaign should be conducted against forced busing. Please complete the questionnaire and return it as soon as you finish my letter.

It is absolutely vital that we win this election. Our failure will mean that millions of California children age 5 on up will be forcibly bused to far away schools in strange neighborhoods. That's why I need your help so desperately now.

We must convince every California voter that forced busing is wrong — that it destroys the concept of the neighborhood school and makes our children the victims of judicial arrogance.

That is why I must have your views now, so we can plan our campaign to expose forced busing for what it

really is: a court-ordered social experiment using our children as guinea pigs.

There are many good arguments against forced busing, but I'd like your opinions, your input; what you really think . . .

*Should we use the high cost of busing as our main campaign issue?

—A forced busing plan (for metropolitan areas only) would cost a minimum of $352 per year, per household, in extra taxes its first year of operation alone! (And if you're single, widowed, retired or have grown children, you still have to pay the extra $352 "busing tax").

*Or should we use the added traffic danger as our main campaign issue?

—Many children will be walking to and from bus stops in the dark. This will drastically increase the number of children involved in traffic accidents. Further, school bus

accidents, always tragic, are bound to increase.

*What about the ever-present danger of violent crime?

—Children in strange, unfamiliar neighborhoods are much more prone to violence than they would be in their own neighborhood, close to the safety of their own home, family and friends. And there's always the danger of a child missing the bus, becoming terrified and getting lost — which again multiples the opportuity for some sick person to make your child a victim of violence.

*What about the quality of education?

—Because our school administrators will be more concerned about racial quotas, district lines and busing schedules, obviously the quality of education will suffer. And with busing will come "busing bureaucrats", more

government employees whose only job will be to bus our children.

*What about private schools?

—Most of us can't afford the $2,000 (or more) per child per year for a private school. So there's really no choice at all — our children would be bused, and we parents can't do anything about it.

*What about our children?

—Children can't study while riding on buses, so their school work is obviously going to suffer. If they are forced by the state to spend as much as three hours per day on the bus, they will have little time to spend with their families. Children riding on buses are not active in sports (or other after-school activities), so their physical health is seriously threatened. But obviously judges and the busing bureaucrats didn't consider the children.

*What about the increased fuel and gasoline these buses will use?

—Because of court-ordered busing, as much as 30 million gallons of gas will be wasted the first year alone, and that's only for six metropolitan counties!

Of course, there are many more arguments against forced busing. And we obviously can't tell our whole story on radio, or television or billboards or newspaper ads. We must select only those issues that concern you most — and frankly, I don't know which issues are the most important to you.

That is why I need your help. Please, right now, consider carefully the questions on your Questionnaire. Then mark your views.

Use only ink to record your replys. Then sign the declaration of opposition to forced busing.

Only the views of opponents to forced busing will be used.

Your reply will be used in determining what message we deliver to the people of California this November.

Finally, I need your help to get our message to the people of California. And to accomplish that goal we must use radio, television, newspapers and billboards. Every time our opponents advertise, we must have the money to counter their political rhetoric with the truth.

Our opponents will raise over a million. They will stop at nothing to win.

We cannot outspend them, but we desperately need to raise all the money we can as soon as we can to get our message across.

With these funds, and lots of hard work, we will win. But every concerned person must help or we will surely lose.

I am asking you to contribute $10.

Ten dollars is not much standing alone. But it will add up quickly if everyone who receives this letter

invests this small amount. I think you'll agree that $10 is a small investment when our children's lives are at stake.

Every single dollar will go directly into delivering your campaign message. On television. On radio. In newspapers, on billboards, in mail-outs and brochures.

So please mail your $10 today (or even as much as $20 or $50 if you possibly can) along with your Questionnaire and declaration of opposition to forced busing.

Sincerely,
/ss/Alan Robbins
Senator Alan Robbins,
Chairman, Californians
Against Forced Busing
Author, Anti-Forced Busing
Constitutional Amendment

P.S. I need your help now on how best to deliver our message against forced busing. So please, send your Questionnaire and $10 donation today in the enclosed postage-paid envelope. Remember, our children need our help to stop the pro-busing judges from interfering

with their education, an education the judges should be protecting, not destroying.

Californians Against Forced Busing,

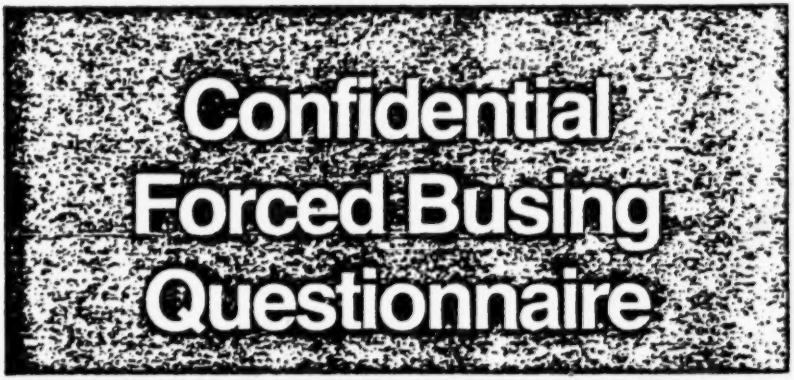
3375 Barham Blvd.,

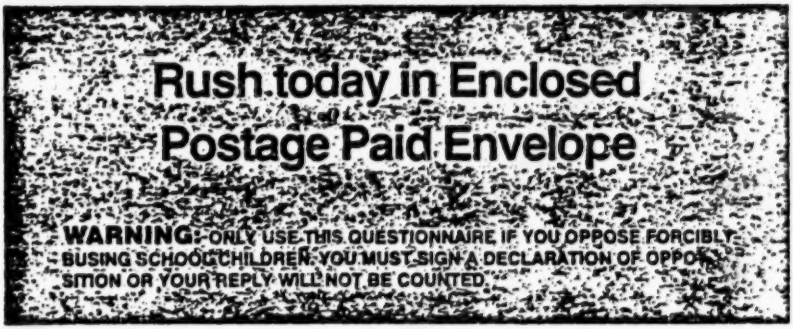
Los Angeles, CA 90068

ID #790813

Not printed or mailed at government expense

Use this booklet to help deliver your message against forcibly busing school children to the voters of California.





INSTRUCTIONS:

A. Carefully consider each question. Remember, you are advising your *Californians Against Forced Busing Committee* on how best to convince undecided voters to vote against forced busing.

B. Be sure to sign *DECLARATION OF OPPOSITION TO FORCED BUSING FORM*. Only *DECLARED OPPONENTS OF FORCED BUSING WILL HAVE THEIR REPLIES RECORDED.*

C. Place your questionnaire in enclosed envelope, mail today.

Begin questionnaire on next page →

1 Read each of the statements of fact about the forced busing of school children which appears below. Select that which you believe to be the very best statement to use in the campaign to persuade voters to your position to end state mandated busing. Fill-in the letter **A** for that best statement. Then select the second best statement and fill-in **B** for that statement. Continue in this manner until you have filled in **F** for the poorest statement.

STATEMENT 1: The forced busing of children to schools far away from their homes could result in an additional $352 per year in taxes for every family in California.

STATEMENT 2: School children walking to bus stops in darkness will cause an increase in traffic accidents involving school children.

STATEMENT 3: Children attending their nearest school in a neighborhood they know are less likely to face the dangers of getting lost or becoming the victim of violence.

STATEMENT 4: More time, effort and money will be spent by educators on forcibly BUSING students rather than in improving the quality of education.

STATEMENT 5: Families that can afford to spend $2000 per year per child will be able to avoid busing until private schools are filled; the rest of us will be without hope.

STATEMENT 6: Family life, an important part of youth development, will be seriously damaged if our children spend three hours a day on buses rather than at home with their family and friends.

	STATEMENT NO.					
	1	2	3	4	5	6
Answer Here ➨	☐	☐	☐	☐	☐	☐

2 Regardless of how you rated each of the above possible campaign statements, mark which media would best be used to deliver each statement of fact. Select one best media for each statement. You may select the same media for two or more statements, but only *one media per statement*.

	STATEMENT NO.					
	1	2	3	4	5	6
TELEVISION	☐	☐	☐	☐	☐	☐
RADIO	☐	☐	☐	☐	☐	☐
MAILOUTS	☐	☐	☐	☐	☐	☐
NEWSPAPER	☐	☐	☐	☐	☐	☐
BILLBOARD/SIGNS	☐	☐	☐	☐	☐	☐

3 If your campaign only raises enough money to use two of the available media to deliver your message, what two media do you believe should be used.
(Mark Two).

TELEVISION	RADIO	MAILOUTS	NEWSPAPER	BILLBOARD/SIGNS
☐	☐	☐	☐	☐

4 If you were trying to persuade one of your relatives, friends or neighbors to vote to end state mandated forced busing, which statement of fact (see Question 1) would you probably use?
(Mark One).

STATEMENT NO.					
1	2	3	4	5	6
☐	☐	☐	☐	☐	☐

5 Which voters do you believe it will be the most difficult to convince to oppose forced busing.
(Mark One).

Group A: ☐ Older citizens with no children or all their children out of school.
Group B: ☐ Young unmarried voters with no children.
Group C: ☐ Voters whose children already attend private school.
Group D: ☐ Married voters who do not plan to have children.
Group E: ☐ Parents with school are children.

6 When the campaign begins, what campaign materials would you use:
(Mark one or more).

☐ **A.** Small stickers for automobile.
☐ **B.** Printed brochures to hand out to friends, relatives and neighbors.
☐ **C.** Button to wear on lapel or vest.
☐ **D.** Postcards to mail to neighbors or friends.
☐ **E.** A small sign for home or office.
☐ **F.** All of above.
☐ **G.** None of above.

continued on next page →

7 How much will you give to convince undecided voters in California to oppose forced busing? Remember, we need some help from everyone to raise the minimum of $1 million needed to get your message out to these voters.

HOW MUCH HAVE YOU ENCLOSED?

☐ $20 ☐ $100 ☐ $10 ☐ $_____ EVEN MORE

☐ $50 ☐ $250 ☐ NOTHING AT ALL

MAKE CHECKS PAYABLE TO: CALIFORNIANS AGAINST FORCED BUSING

STATEMENT OF OPPOSITION TO FORCED BUSING

I (We) hereby declare opposition to forcibly busing school children, thus qualifying to help determine what anti-forced busing arguments should be emphasized in the upcoming election campaign.

MUST BE SIGNED FOR QUESTIONNAIRE TO BE TABULATED

Sign the validation form below and return it with your Confidential Busing Questionnaire in the enclosed postage paid envelope

_____

FIRST OPPONENT OF FORCED BUSING SIGN HERE

_____

SECOND OPPONENT OF FORCED BUSING SIGN HERE
must be signed to validate

NOT PRINTED OR MAILED AT GOVERNMENT EXPENSE
Californians Against Forced Busing, 3875 Barham Blvd., Los Angeles, CA 90068 ID #758013

LETTERS FROM FRED OKRAND DATED JANUARY 11 AND 16, 1979

[48 C.T. 14162-14163]

January 11, 1979

Hon.
State Capitol
Sacramento, California 95814

Re: Senate Constitutional Amendment No. 2, Assembly Constitutional Amendments Nos. 6 & 7; Assembly Bills No. 5 and 41.

Dear Senator:

I am one of the attorneys for the petitioners in Crawford vs. Board of Education of the City of Los Angeles, the Los Angeles school desegregation case now pending as No. 822854 in the Los Angeles Superior Court and the subject of the California Supreme Court's decision in Crawford v. Board of Education (1976) 17 Cal. 3d 280. I have examined the above named proposed bills and constitutional amendments. It is clear from a reading of them that those proposals are variously designed to maintain and perpetuate the segregation extant in so many of our California schools

and districts and to prohibit public agencies, including the Courts, from requiring correction of that denial of equal educational opportunity now visited upon the minority youngsters trapped in such schools.

I write to remind you of the fate of the similarly motivated "neutral on its face" Proposition 14 on the 1964 California ballot which prohibited public agencies from interfering with the right of a home owner to refuse to sell or rent his or her property to persons as he or she chose. That measure was struck down by both the California and United States Supreme Courts (64 Cal.2d 529, 387 US 369, [Mulkey v. Reitman and Reitman v. Mulkey respectively]) because it was clear that the State was putting its weight behind the private "right" to discriminate in housing. The proposals now before the legislature seek to do the same thing as to schooling.

It is clear that if any of the above mentioned proposals is enacted, it would be a de jure, intentional act of discrimination. It would be putting the weight

of the State behind segregation. Likewise, a vote by a legislator for such legislation would be a de jure, intentional act of discrimination; he or she would in like manner be attempting to put the weight of the State behind segregation. You may want to consider this fact should you be called upon to vote upon this or similar legislation.

Sincerely yours,

Fred Okrand

FO/yt

[48 C.T. 14164]

January 16, 1979

Hon.
Member of the Assembly
State Capitol
Sacramento, California 95814

Re: Senate Constitutional Amendment No. 2; Assembly Constitutional Amendments Nos. 6 & 7; Assembly Bills Nos. 5 and 41.

Dear:

[Text the same as the January 11, 1979, letter just set out.]

SENATE BILL NO. 1244, DATED JULY 19 1979
[48 C.T. 14158-14159]

AMENDED IN SENATE AUGUST 27, 1979
AMENDED IN SENATE AUGUST 20, 1979

SENATE BILL No. 1244

Introduced by Senator Robbins
(Coauthors: Senators Briggs, Campbell, Carpenter, Craven, Cusanovich, Alex Garcia, Russell, Schmitz, Speraw, and Wilson)
July 19, 1979

An act to add Section 523 to the Evidence Code, relating to burden of proof, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 1244, as amended, Robbins. Burden of proof.

Existing state law provides that a party has the ultimate burden of proof as to each fact the existence or nonexistence of which is essential to the claim that is being asserted. Existing law also specifies that a presumption is an assumption of fact that the law

requires to be made from another fact or group of facts found or otherwise established in the action; and creates presumptions affecting the burden of proof, although a presumption is not evidence. The effect of such a presumption is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. Existing law also specifies that an inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

This bill, in addition, would provide that the burden of proof, in specified actions concerning the use of pupil school assignment or pupil transportation in order to enforce any provision of the California Constitution, may not be shifted, ameliorated, or modified by any presumption, inference, or other rule of procedure.

The bill would take effect immediately as an urgency statute.

Vote: 2/3. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 523 is added to the Evidence Code, to read:

523. In any action or proceeding seeking or otherwise involving the imposition or continuation in effect upon the State of California or any public entity, board, or official of any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation in order to enforce any provision of the California Constitution, the party or parties seeking the imposition or continuation in effect of any such obligation or responsibility has the burden of proof as to each fact the existence or nonexistence of which is necessary to the granting or continuation in effect of such relief, and no presumption, inference, or other rule or procedure shifting, ~~ameliorating~~ or modifying this burden of proof may be

imposed or applied at any stage of such action or proceeding. This section shall apply to all actions and proceedings pending as of January 31, 1980, or commenced after that date.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

If Senate Constitutional Amendment No. 2, chaptered as Resolution Chapter 18 of the Statutes of 1979, is approved by the voters, it can reasonably be anticipated that substantial and immediate litigation will result. Therefore, it is necessary that this act take effect immediately as an urgency statute.

SUPERIOR COURT, RESPONDENT'S MOTION TO STRIKE NEWSPAPER AND OTHER UNOFFICIAL REPORTS IN PETITIONERS' REPLY MEMORANDUM AND APPENDIX RE PROPOSITION 1, DATED JANUARY 21, 1980

[48 C.T. 14375-14376]

Respondent Board of Education of the City of Los Angeles ("the Board") hereby moves to strike the copies, quotations and references to newspaper and other unofficial reports contained in petitioners' reply memorandum and appendix regarding Proposition 1 on grounds that there is insufficient foundation, that such reports are multiple hearsay, that such reports are irrelevant, that copies of such reports are not the best evidence, that copies of certain reports in said appendix are illegible, incomplete and inaccurate and that the pages of said appendix are not numbered consecutively at the bottom, contrary to Rule 201(b) of the California Rules of Court, which makes specific reference to pages of said appendix unduly burdensome and oppressive.

Said motion is based upon this written motion, the attached memorandum of points and authorities in support thereof, and all pleadings and papers heretofore filed herein.

DATED: January 21, 1980.

McCUTCHEN, BLACK,
VERLEGER & SHEA
G. WILLIAM SHEA
PETER W. JAMES
DAVID T. PETERSON
MICHAEL M. JOHNSON
JUDD L. JORDAN

JERRY F. HALVERSON

/ss/Judd Jordan
By Judd L. Jordan
Attorneys for Respondent

SUPERIOR COURT, PETITIONERS' REPLY TO RESPONDENT'S MOTION TO STRIKE NEWSPAPER AND OTHER UNOFFICIAL REPORTS IN PETITIONERS' REPLY MEMORANDUM AND APPENDIX RE PROPOSITION 1, DATED APRIL 23, 1980

[55 C.T. 16484-16513]

[The text of this legal memorandum is omitted here.]

SUPERIOR COURT, MINUTE ORDER, DATED MAY 19, 1980

[This is set out as Appendix E to the Petition for Writ of Certiorari, pp. 76A-80A.]

SUPERIOR COURT, FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MINUTE ORDER OF MAY 19, 1980, DATED JULY 7, 1980

[These are set out as Appendix F to the Petition for Writ of Certiorari, pp. 81A-93A.]

SUPERIOR COURT, OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER HEARING RE: SUFFICIENCY OF THE RESPONSE BY RESPONDENT TO THE EXISTING WRIT OF MANDATE AND TO ORDERS IN AID THEREOF ISSUED PREVIOUSLY HERETO AND AFTER HEARING OF OTHER PARTIES' PROPOSAL FOR ALTERNATE FORMS OF REMEDIES, DATED JULY 7, 1980
[58 C.T. 17448 to 59 C.T. 17544]

From March 1977, this court has, in its duty of overseeing the Los Angeles Unified School District's response to the requirement that it desegregate its schools, restrained its activities to either granting or denying approval of the requests made by the respondent board concerning its desegregation activities. This restraint is compelled by what the court perceives as the law, [1] and by the sense of this

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[1] **Crawford v. Board of Education**, 17 C.3d 280, Cal.Rprt. 724, 551 P.2d 28 (1976)

Swann v. Charlotte Mecklenburg Board of Education (1971) 402 U.S. 1 [28 L.Ed.2d 554, 91 S.Ct. 1267]

court that the desegregation activities of the board involve immense efforts which affect large numbers of people in an important way and should be planned and implemented by the Board of Education which is the elected representative of those people. This political process should be a responsive instrument to produce mandated community change and, if followed in good faith and in pursuance to the mandate, should promise longer-lasting success than the imposition of a plan by an impatient, even though well-meaning, judge, who seeks a quicker and more efficient plan. [2] However, the test of the continuation of this restraint is the court's appraisal of the school board's commitment to the necessity of immediately instituting reasonable and feasible steps to alleviate school segregation and to produce meaningful progress in the elimination of segregated minority schools. [3]

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[2] **Crawford, supra,** 17 Cal.3d at 306 and **Swann, supra,** at 416

[3] **Crawford, supra,** at 307

In the nearly four years since the affirmation of this court's mandate, [4] it has heard in behalf of the respondent's case testimony on the prior plans [5] and, in the present hearings, results of the execution of one of its plans; read the reports of the court's referee, [6] the reports of the court-appointed monitoring committee; [7] examined and read the written evidence which includes the reports of the court-appointed experts; [8] received over 420 written exhibits, and conducted 170 days of hearings. That evidence, the arguments thereto, and the deliberations of this court, lead it to conclude that the respondent

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[4] June 28, 1976

[5] See section on Legal History

[6] See Minute Orders of July 5, 1977 and July 8, 1977, November 15, 1977 and November 18, 1977

[7] See Minute Orders of May 3, 1978, May 12, 1978 and Charge to the Monitoring Committee, May 24, 1978

[8] See Minute Orders of February 7, 1978 and February 22, 1978

board does not have a course of action which is designed to make meaningful progress in the elimination of harms arising out of minority segregated schools, and that the respondent board does not appear to have resolved itself to achieve any such plan in the near future.

This court, on February 7, 1978, approved conditionally the board's plan put into execution in September 1978. The manner in which the plan was executed carried the seeds of failure to achieve its limited goals. That execution was shaped by the inadequacies of the implementation process and by the board's reaction to political pressures and by the political responses of various segments of the school community. Based upon the record of that failure, the board, midway through the hearings of the modifications to that limited plan, requested this court that it be permitted to abandon all existing mandatory provisions of that plan, which in effect would require the abandonment of presently constituted and operated

pairs, clusters and midsites formed under those mandatory provisions; and lastly, that it be allowed to return the school district to a voluntary plan which would depend completely upon the voluntary compliance by parents and children of this district to a mandate of this court which was directed to the board.

The rationale advanced for this change was that all mandatory assignment of children for the purposes of desegregation is counterproductive of desegregation because it induces white non-participation and would reduce the district rapidly to an all-minority system. In tandem with this argument is the suggestion that mandatory assignment involves busing which is both unlawful and useless.

The phenomenon of white non-participation or "white flight" was examined with great particularity by this court in the hearings held between October 22, 1979, and April 11, 1980. White flight, as differentiated from normal demographic change, is an occurrence which is associated with mandatory

reassignment of children for the purpose of school desegregation. This phenomenon has been examined for 20 years by various experts on the desegregation experience in the United States and those results were made available in this court.

The court's conclusion is that the white withdrawal experience in Los Angeles and the anticipation of it are not bars to the adoption and drawing of a comprehensive desegregation plan which would desegregate many isolated minority schools, nor is it a bar to the use of mandatory reassignment of children for such purposes, but is one of many other important factors which must be carefully weighed and evaluated in the planning and implementation of a fair, practical and feasible plan of desegregation of the minority schools of this district.

The court finds that the respondent's proposed all-voluntary plan is not an adequate response to the mandate of this court because:

1. It is not designed to desegregate any of the minority schools of the Los Angeles Unified School District.
2. It treats minority children with less concern than other children in the district.
3. It relies entirely upon the voluntary compliance of the mandate by the children and their parents, which reliance is neither reasonable nor realistic.
4. Its provisions, viewed in light of the board's activities, do not demonstrate the board's commitment, even if given more time, to take additional steps to produce meaningful progress in the desegregation of the district's minority schools and the alleviation of the harms arising from segregation.

In view of the foregoing, the court intends to find that it has no other option available than to intervene actively in the supervision of the preparation and the implementation of a reasonably feasible desegregation plan so that it may be assured that the respondent district will afford equal protection to all of its students and thus meet its constitutional obligation to the minority children of its schools. These conclusions are compelled by examining the history of this case, the board's proposed voluntary plan, and other determinative factors set forth in the succeeding pages.

LEGAL HISTORY

This class action was originally brought on August 1, 1963, by black high school students against the Board of Education of the City of Los Angeles, seeking to desegregate Jordan High School where the petitioners were attending. The complaint alleged, in substance, that Jordan High School, with a student

enrollment over 99 percent black, was situated one and one-half miles from South Gate High School which had a student enrollment over 97 percent white. Petitioners also sought to enjoin the board from further expanding Jordan High School.

Subsequently, on July 6, 1966, the complaint was amended to include all segregated schools in the Los Angeles Unified School District and all black and Hispanic children attending those segregated schools.

For a period after the action was filed, the case remained relatively dormant while petitioners and the court attempted without success to get the board voluntarily to implement a desegregation plan for the district. Finally, the trial of the liability issues began in October, 1968, and continued intermittently for 65 court days, concluding in June, 1969. On May 12, 1970, the court issued its findings of fact and conclusions of law, judgment and peremptory writ of mandate commanding the respondent board to prepare and implement a reasonably feasible desegregation

plan for the Los Angeles Unified School District that would establish a racially nondiscriminatory unitary school system.

Underlying the mandate were the court's findings that the respondent board was operating a dual school system that was becoming increasingly segregated, and specific findings that the board, acting in bad faith, had failed to take any steps to attempt to alleviate the segregation, but had, instead, knowingly and affirmatively contributed to and perpetuated the segregation. These findings were based on a history of school board actions and inactions involving siting and construction of new schools, transportation and open transfer policies, feeder patterns, and mandatory school attendance areas and boundaries which created and perpetuated segregated schools. The court concluded that the conduct of the respondent board was systemwide and de jure in nature, in violation of the California and United States Constitutions.

The respondent board appealed the judgment, contending that the admittedly existing segregation was de facto in nature and not de jure, and the board therefore had no obligation to take any action towards desegregation of its schools. On March 10, 1975, the California Court of Appeal reversed the judgment which had been stayed pending the appeal.

On June 28, 1976, approximately thirteen years after the action had been filed, the California Supreme Court, in a unanimous opinion, affirmed the trial court judgment in all respects, save its definition of a "desegregated" school, and remanded the case for further proceedings consistent with the court's opinion. The Supreme Court specifically affirmed the finding of the trial court that segregation in the Los Angeles Unified School District was de jure in origin. **Crawford v. Board of Education** (1976) 17 Cal.3d 280.

Following remand from the Supreme Court, various individuals and groups sought to intervene for the purpose of participating in the remedial phase of

these proceedings. Initially, this court denied intervention by all prospective intervenors, but the Bustop intervenors sought and obtained a writ of mandate from the Court of Appeal directing this court to grant Bustop's petition for intervention. Upon receipt of the Court of Appeal mandate, this court entered orders granting leave to intervene to Bustop, Dreebin et al. and Integration Project, Better Education for Students Today (BEST), and Diane Watson, school board member, who was permitted to intervene individually. Intervenor Watson later withdrew and intervenors Loveland and Keipp substituted in her place. In the summer of 1979, pursuant to writ of mandate of the California Court of Appeal, United Teachers of Los Angeles (UTLA) was granted leave to intervene. In addition, amicus curiae status was granted to several individuals and the court has received numerous briefs and suggestions from amici.

On March 18, 1977, the board submitted its first desegregation plan for the district (Plan I). Hearings were commenced on March 23, 1977, to determine whether the plan complied with the requirement of **Crawford** and with this court's mandate. Following twelve weeks of hearings, the court rejected the board's first plan, concluding that the plan's part-time desegregation provisons would not desegregate any school in the district and would reach so few of the segregated minority schools as to be wholly ineffective in desegregating the district. (Minute Order, July 5, 1977.)

The court ordered the board to return within 90 days with "a plan or plans which realistically commence the desegregation of this district by no later than February, 1978 . . . and which plan or plans promise within their terms to complete such desegregation process within a reasonable period thereafter." (Id. at p. 10.) The July 5 Minute Order

carefully spelled out what would be necessary for the evaluation of the Board's plan:

> ". . . [T]he Board shall consider all reasonable alternative plans to the plan or plans which it shall finally submit to this court. . . . The plan or plans . . . shall be either accompanied or supported by detailed findings and conclusions, including all evidentiary data; summaries of the opinions of experts' studies, both staff and outside; all statistical information, all costs and benefit studies; all financial information; all educational benefits and detriments; and, any and all information developed either in support of its final plan or plans or used in evaluating the alternative plans." (Id. at pp. 11-12)

The board was also directed to present a cost and feasibility study with respect to desegregation of the district's minority schools falling within the 80-100 percent minority segregated range. (Id.)

On October 3, 1977, the board submitted its second desegregation plan titled "Integrated Educational Excellence Through Choice" (Plan II). Extensive pretrial activities ensued. The petitioners and intervenors Loveland and Keipp, and intervenor Integration Project filed objections to the new plan

and motions for an order declaring Plan II to be constitutionally insufficient. Intervenor Bustop argued that the plan should be rejected because it would increase the incidence of white flight and lead to resegregation. The board, on the other hand, moved the court for an order allowing immediate implementation of the plan, prior to a hearing on its merits. As part of the prehearing process, the board was required to answer written questions posed by the court, calling for the further elaboration of its new plan. (See "Respondent's Answers to Judge Egly's 22 Questions" filed November 29, 1977). Five days of hearings were held in the latter part of January, 1978, on the various motions of the parties.

On February 7, 1978, the court provisionally approved the implementation of Plan II as "an important initial step toward the eventual compliance with the writ of mandate." (Minute Order, February 7, 1978, p. 4.) The board's new plan patently did not comply with the court's interpretation of the mandate

requiring "a plan which, in its terms, is sufficiently specific so that the promise to achieve a goal of desegregation within a reasonable time can be determined by inspection of the terms of the plan itself." (Id., p. 4.) However, the court accepted the board's statement of its commitment, reasoning: "The plan offers a structure which allows for major additions and modifications in accord with a timetable. The board's broadly stated goal of complete integration is the same goal as is required by this court in the writ." (Id., at p. 4.)

The board was given until December 31, 1978, to add the necessary amendments and modifications to its plan. However, the court specifically withheld final approval of Plan II pending an examination of the anticipated amendments to the plan and until the board had been given an opportunity to act either by implementing such amendments or including them in future plans with sufficient specificity to determine whether the board had met or intended to meet the

mandate to desegregate its schools. (Id., at p. 7.) The February 7 Minute Order further provided for the appointment of experts to examine and report to the court with respect to the various issues raised by the court and the parties.

The period from February to August 1978 was occupied with the appointment of the court's experts, the establishment of a monitoring committee to monitor the district's desegregation efforts, and with the district's preparations for implementing its desegregation plan in September 1978. The district's preparation continued until August 31, 1978, when, pursuant to a writ of supersedeas issued by the California Court of Appeal, Plan II's implementation was stayed incident to an appeal by Bustop of an order of this court denying Bustop's motion to enjoin certain components of Plan II asserted to be in violation of the United States Constitution.

On September 5, 1978, one week before the start of school, the board joined Bustop's request that the

California Supreme Court stay implementation of the district's desegregation plan. However, petitioners and intervenors Loveland and Keipp, and Integration Project successfully petitioned that court to vacate the writ of supersedeas. Thereafter, Justice Rehnquist and Justice Powell of the United States Supreme Court refused to interfere.

On September 12, 1978, the Los Angeles Unified School District began the new school year under its desegregation plan, without violence or other major disruption.

On November 14, 1978, the expert witnesses appointed by the court rendered their written reports. These reports covered several areas including demography, definition, plan goals and standards, feasibility assessments, bilingual educational needs, the need for metropolitan planning and its feasibility.

In December 1978, with the deadline approaching for the filing of the modifications and amendments to its desegregation plan, the board requested additional

time to February 28, 1979, to respond to the February 7 Minute Order. The extension was granted in order to give the board sufficient time to study the experts' reports.

On March 12, 1979, after the expiration of the extension, the board filed its supplement to Plan II, "Response to Court Order of February 7, 1978." Thereafter the court convened a pretrial conference to determine how the parties would proceed with the trial to determine the sufficiency of the board's plan. A trial date was set for June 4, 1979.

In May 1979 the board requested a continuance of the trial date, contending that a June trial would have little or no effect on the September school year except to escalate community anxiety and uncertainty with respect to the second year of the plan's implementation.

The board further contended that it had been unable to complete discovery and would be severely

prejudiced and deprived of due process if forced to go to trial in June.

On May 30, 1979, the court granted the board's motion for continuance on condition that the status quo was maintained and that desegregation efforts under the present plan were neither reduced nor enlarged without approval of the court being first obtained. A new trial date for determination of the sufficiency of the board's plan was set for October 15, 1979.

On August 27, 1979, prior to the commencement of the 1979-80 school year and prior to any race and ethnic survey of enrollment, the board adopted a motion directing its legal counsel to seek the court's permission to abandon all mandatory portions of its desegregation plan and to substitute an all-voluntary plan. Based on this board action, intervenor Project Integration moved the court to declare the board recalcitrant, and to appoint a master to draw a desegregation plan for the district. The motion was

heard on October 10, 1979, and was denied by the court as being premature. On that date, however, the board's attorneys for the first time indicated to the court that the board did indeed intend to abandon its current plan and turn to an all-voluntary plan, if permitted by the court. The board again requested a continuance which the court granted and hearings were continued to October 22, 1979.

At the court's prodding, on October 17, 1979, the board filed its further proposed amendment to its current plan. This ten-page document, titled "Board's Response to the Court's Request of October 10, 1979," requested for the first time in writing the court's permission to withdraw all of the mandatory portions of Plan II, and to substitute an all-voluntary plan.

On October 22, 1979, the board requested another continuance of the hearings, which was denied. Finally, on that date, the hearings on the board's current plan and on its proposed all-voluntary plan began.

On November 16, 1979, almost four weeks into the hearings, the board submitted a supplement to its October 17, 1979 filing, titled "Integrated Educational Excellence Through Choice, Voluntary." On January 31, 1980, three and one-half months into the hearings, the board filed as part of its plan Exhibit #74, a three-page document entitled "Voluntary Desegregation Program, Guidelines for Implementation." This document presented for the first time the administrative procedures for implementing the major components described in the November 16, 1979 submission. The document had not yet been adopted by the board as part of its proposed plan.

In the November 6, 1979 general election, Proposition 1, the so-called Robbins Anti-Busing Bill, was approved by a majority of the voters of the State of California. Proposition 1 amends the equal protection clause of the California Constitution to require, in desegregation cases, that, among other things, any remedy imposed by a California state court

would not "exceed" the remedy required by federal courts, an attempt to require a "de jure" finding before providing a remedy. The Board, supported by intervenor Bustop, filed a motion seeking to apply the amendment to this case. In opposition to the motion, petitioners seek to have the amendment declared unconstitutional.

DESCRIPTION OF THE PARTIALLY APPROVED PLAN INSTITUTED SEPTEMBER 1978

At the commencement of the School Year 1978-79, the Board placed in execution a plan of desegregation for the relief of the isolation of minority students. The compulsory portion of the plan encompassed only grades 4 through 8, while the voluntary portion was open to all grades. The result has been the formation of 165 schools into pairs, clusters and midsites, and designation of another 54

schools as magnets.[1] This was accomplished by mandatory reassignment or the threat of reassignment. Most of the minority students as of this date remain in those programs, while many white children have withdrawn, mostly from San Fernando Valley schools, either by transferring to other schools within the Los Angeles Unified School District or by withdrawing entirely from the school system. All parties agree that the plan has not fulfilled its initial promise, but their reasons differ. Intervenor Bustop and the board have argued that the plan is a failure because of the excessive white withdrawal rate, while the intervenor Project Integration, and the petitioners fault it for not being extensive enough in its coverage of grades and schools. From any view, the plan suffers from the same deficiencies identified by this court on February 7, 1978, dealing with the failure of the

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[1] See Exhibits 1 and 2 for a graphic description of the composition of the pairs, clusters and midsite combinations now in operation.

district to adequately address the grades and schools not included by the board's plan.

Formal hearings were commenced on October 22, 1979, and evidence heard with regard to the board's modification pursuant to the February 1978 order respecting alternate plans and suggestions for orders respecting the role of the board. During these hearings and on November 16, 1978, the board filed a request wishing to withdraw from the court's consideration all provisions in its operational plan which required mandatory assignment of children for desegregation and requesting the abandonment of all existing pairs, clusters and midsites which were formed and which were kept together by reason of mandatory reassignment. The board, at the same time, asked the court to approve a new all-voluntary plan which would consist of an increase in the PWT program to 40,000 students, the expansion of the magnet program and the creation of "stably" integrated communities; and lastly, the continuance of

any pairs, clusters and midsites which wished to continue on a voluntary basis. A later filing further recognized that there would be large numbers of minority schools which would be untouched by any of the three voluntary provisions in the plan and proposed that a study be commenced to determine what further steps would be taken to alleviate the harms of racial isolation which have been and are being caused by the segregated condition of the Los Angeles Unified School District.

The board's articulated reason for the request that the court approve an all-voluntary integration plan is that mandatory reassignment of children for the purposes of desegregation is counterproductive to desegregation by reason of the stimulation of white flight. The intervenor, Bustop, joining the motion, argues that it is wrongful to mandatorily assign children for purposes of desegregation because it does violence to the neighborhood school concept, and that it is unlawful and not required under any case law

governing this action. But, because the board is not requesting a continuation of this plan and has requested modifications which essentially abandon most of the present plan, such request requires examination of only the all-voluntary plan and the reasons given for it.

REQUESTED MODIFICATIONS OF THE PREVIOUSLY FILED OR ALL-VOLUNTARY PLAN

These requested modifications which produce an all-voluntary plan are divided broadly into three major components which will be discussed separately as Component "A," Permits with Transportation; Component "B," Magnets; and Component "C," Complexes.

COMPONENT "A"

PERMITS WITH TRANSPORTATION (PWT)

The PWT program as envisioned in the board's voluntary plan is its major component. The PWT experience under various names reaches back a number of years in the district. While it has been described in various exhibits received in this case, it is, simply stated, an open option transfer program, wherein any student who desires to transfer from his home school to another school may do so under the condition that the transfer will enhance the racial and ethnic balance of either the sending school or the receiving school. While not unlimited, transportation is afforded to most students. Great efforts have been made by the district to encourage this program. When this case was first tried in 1977, the participation in the program was approximately 9,500 students. Leave was granted by this court in the summer of 1977 to expand the program to 20,000 students pending the adoption of a new plan by the board and the approval of that

plan.[1] Considerable expansion did occur. At the present writing, there are approximately 18,500 students participating from over 250 sending schools and 144 receiving schools. Of these students, 4,500 are elementary, 7,800 are junior high, and 6,200 are senior high students. Almost all of the students participating (99.9%) are minority students,[2] and most are black. The program is indeed a one-way busing program and is the heaviest user of busing in the present operational plan. Its cost in 1978-79 was $18,451,949, of which $14.5 million was for transportation. The board seeks to increase this PWT program to 40,000 students and hopes to recruit minority students who would not otherwise be in a desegregation

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[1] This approval was strenuously objected to by the petitioners on the grounds that the PWT program would be used to protect white students from any mandatory assignments for desegregation purpose. Hindsight suggests that this opposition proved well founded.

[2] Only 40 to 50 white children participate in the PWT program.

program by reason of the requested abandonment of the present mandatory pairs, clusters and midsites.

The burdens imposed upon minority children who choose to take part in the present program are prodigious. Their average bus ride is 55 minutes each way, which means that thousands of these children are subject to even longer times en route to school. The board now proposes shorter times by grouping sending and receiving schools. The willingness of the parents of minority children to accept this requirement is a fair measure of the efforts which the minority child and parent make to secure an education of a quality that they perceive is not afforded in their racially isolated neighborhood school, but is offered in a predominantly white school. The main advantage that the plan offers to the receiving school is that the receipt of PWT minority children in sufficient numbers will accord the receiving school a desegregated status, and thereby insulate all resident students in that school from any reassignment for purposes of

desegregaion. There are usually only disadvantages to the sending school and few advantages. The minority sending school remains segregated. There is no history of a reverse PWT influx into sending schools by white students. PWT in most instances by its very nature drains many bright and highly motivated children from their resident schools to the detriment of those schools. However, because it affords those children their only opportunity to obtain an education in a desegregated or predominantly white setting, there is an advantage to the minority children in the absence of other desegregation programs in the district.

It is the court's perception of the law that it is the duty of the school board to desegregate its minority schools, not just to provide integrated experiences to minority children. The minority child's PWT experience does not remove the stigma attached to the sending school or the stigma to the child of going from that sending school who understands that the school he would normally be assigned to would be an all-minority

school were it not for his own effort to leave that school. Further, it is often the case that the PWT minority child is accorded a second class status in the receiving school in that he is continually subject to the threat of having his attendance at that school discontinued for disciplinary reasons when that sanction would not be applied to the resident student. The PWT student, by his participation, is placed in a setting which is his not by right but by permission. The inequality of treatment of the minority child in that situation is clear. [3]

The inequitable treatment inherent in PWT programs as thus far applied in the district is a clear violation of the right of minority students to equal protection. It is especially true in the all-voluntary plan proposed by the district, where this form of PWT is relied upon as the major instrument of desegregation. The violation would also occur if PWT were

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[3] See Exhibit II-3 entitled "Response to Court's Order of February 7, 1978," at pps. 46-50.

permitted to thwart or to distort the desegregative effect of other programs by insulating students from assignment under those programs. However, when none of these conditions apply, PWT may represent the only option available for pupils who would not otherwise have access to what they perceive to be a better educational opportunity, and in that setting the program can be included as a residual component of a desegregation program.

COMPONENT "B"

MAGNETS

The magnet technique is used by many districts to promote voluntary desegregation. It is quite simple in concept. If a school can, because of its uniqueness, attract students of various races and ethnicities from segregated schools within its district, and if the resulting enrollment is controlled, the school that is produced should be desegregated. As a controlled tool, it can be effective for desegregation in certain circumstances. To be effective it is best applied in a district which is small-to-medium in size and has a staff with considerable skill in planning and implementation techniques. Still, if the sending schools are either all-white or all-minority, they will not be desegregated. They may be less segregated if there is an excess of either white or minority children in an already biracial or multiethnic school. The receiving school will desegregate only if the racial mix is properly controlled by enrollment and the excess

resident students are transferred elsewhere. These complications are added to by the requirement that space be found either by utilizing nonused space, evacuating space presently used, or building new structures.

The history of magnet programs as a desegregative device in Los Angeles is dismal. It is and was expensive and by reason of its very structure unable to affect more than a small percentage of minority children.

There are 29 elementary magnet programs in Los Angeles, of which ten enroll less than 30% white children. By even the most lenient of definitions, only 19 elementary programs in the entire district have achieved various forms of desegregation through the use of magnet schools.

Of the 19 schools in the junior high program, two are completely minority, one has a 2.5%, white participation, and one has 7.5% white participation; two others have white participation of less than 30%.

The remaining 12 schools are considered desegregated by the board.

The high school magnet program (which is the only desegregation program for high schools in the district) involves only two schools and 207 students.

Both the district and the experts who have reported and testified in this case question the use of magnet schools as a major program for desegregating the Los Angeles Unified School District. They are unanimous that it is unlikely that any minority segregated schools in Los Angeles will be desegregated by the use of magnets and that the use of magnets cannot desegregate the district.

Magnets, however, can be a useful auxiliary in special situations where special programs will have an appeal and should be offered, with the understanding that they are ancillary to any existing desegregation programs. They may also be used in alleviating the harm of racial and ethnic isolation. However, it must be noted that the initial magnet program's success, if

any there was, has been attributed to the threat of mandatory assignment in grades 4 through 8. Where the court finds there was minority student participation in the magnet school program, it was almost wholly black. The Hispanic participation in magnet schools was extremely low, leaving unaffected by magnet programs a group constituting 40% of the district's entire enrollment which proved unattracted by those magnets.

COMPONENT "C"

COMPLEXES

The third major component of the board's all-voluntary plan is the complex proposal, described more particularly in the submission of the board on November 16, 1979 (See Reporter's Transcripts Vols. 32, 34 and 37). The geographic boundaries of the complexes seek to define neighborhoods which the board claims to be "stably integrated." The plan would isolate students from those neighborhoods from

assignment or availability to any other desegregation program. The nucleus of the complexes and its basic indicator is a high school which encompasses to some degree, by its attendance boundaries, an integrated neighborhood which it is hoped identifies a stabilized community. By identifying those communities and relieving the schools in them from further outside desegregation process, the hope of the designer of the plan apparently is to promote and keep an integrated neighborhood by adding the school district's efforts to those which should be exerted by the city, state and other planning agencies. However, because the high school represents the feeder pattern of numerous grammar schools and junior high schools, many of which are segregated, the designer of the plan understands that the makeup of the high school only represents the composition of the high school's attendance boundaries without necessarily integrating the grammar schools and junior high schools. In order to accomplish the desegregation of those schools,

respondent assumes that the use of magnets and other voluntary programs will be available to the administrators of the complexes and, with the involvement of the community, the staff, parents and the board, an internal plan may be devised which will voluntarily integrate the schools within that area. That portion of the plan is somewhat vague as to exactly what means would be used but it does utilize some concepts deemed necessary by the experts who have reported or testified in this case. The total number of children encompassed in those complexes is 180,000, of whom 60% would be minority and 40% white. This would limit the applicability of this component of the plan to 35% of the students in the district.

The complex component is attractive because it reduces the size of desegregation units to more manageable areas; it uses community input to foster community acceptance and thus reduces white withdrawal; it seeks to stabilize areas which have potential for some permanency in their integration; it

is not as expensive as the other components because it cuts down the amount of transportation needed; and, lastly it recognizes the differences in the various communities within the Los Angeles Unified School District and allows adjustment for those differences. Its weakness is, of course, that it would use the same techniques in the desegregation of those complexes as are proposed by the board for the entire district; that is, voluntary compliance without either mandatory assignment or the threat of mandatory assignment to insure compliance.

The concept of complexes has been used in many large cities in which desegregation has been instituted. The court, however, has some doubt on the evidence presented that the complexes chosen here are truly identified communities; that this component as drawn can stabilize these communities; or whether many of these communities can be stabilized in view of the history of the changing demography of the district.

If magnets are the principal device to desegregate the schools within the complexes, then greater thought in planning and execution will have to go into the make-up of that interior plan. This has not been demonstrated in the November 16th submission, [4] and as a matter of fact such techniques within the complexes have been vaguely described only as "attractive educational programs." The hopes of the board's planner, that the complexes will automatically desegregate themselves, are in this court's opinion misplaced when compared to the history of the operation of magnet programs district-wide.

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[4] A supplemental filing was made by the Board of Education on January 31, 1980, three-and-a-half months after the commencement of the hearings, which for the first time set forth that the three programs (Magnet, PWT and Complexes) would be coordinated in such a manner and in a planned sequence to keep all three programs viable. The sequence of implementation placed first priority upon the formation of the complexes; secondly, upon district magnets, and lastly, on PWT.

WHITE FLIGHT

The main thrust of the board's argument advancing an all-voluntary program is that such a program will not produce white flight and thereby will cause the district to accelerate to an all minority district; corollary to this is the argument that any mandatory assignments for desegregation will cause large amounts of white student nonparticipation which would be destructive. To examine this argument it is necessary to examine the theory of white flight and its history and cause in the LAUSD.

White flight is usually described as the anticipatory or reactional withdrawal from the participating schools or grades by white parents and their children as a result of the threat or the imposition of any desegregation by any governmental body. Flight is not measured by the total loss of white children, but only the loss of those children due to avoidance of desegregation. The historical annual loss rate in the Los Angeles Unified School District of white children

is 5.8% (see Report of Reynolds Farley, Page 25). [1] The total loss of white children in the two years that this plan has been in operation has been approximately 25,000, or 13% over and above that demographic prediction. It has been especially heavy in the participating grades. The loss has been concentrated in schools in the San Fernando Valley. (For discussion of the factors involved, see Monitors Report No. 10.) White flight was anticipated in the order of February 7, 1978, but that excessive white flight occurred in September 1978 was due, in this court's opinion, to the failure by the board to execute its own plan within its own guidelines.

Because Plan II, as approved on February 7, 1978, provided that the pairs and clusters would be confined within definite geographical limits, described as Educational Leagues, an element of fairness could be maintained by the drawing of those educational

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[1] Exhibit II-354 and II-355.

leagues in such a way that each school would have approximately the same types of choices and burdens. However, the board's execution, with its emphasis upon voluntary compliance, caused the league concept to be abandoned early and even while it was being approved by this court. The abandonment of the leagues allowed a disorderly rush in which each school sought to obtain an advantage over other schools. The result was that the pairings which imposed small burdens upon the early participants left the difficult choices to the late participants, causing the remaining pairings to become extremely burdensome and giving an element of favoritism and unfairness to the entire plan. It is the court's opinion that the administration of this plan in that manner led as much to the dissatisfaction of the white community with the board's desegregation plan as any other single factor. It pitted school against school without an articulated reason, and violated the first rule of any acceptable plan that it be fair and require that if there are burdens that they be assumed

as equally as possible by all participants. An examination of the two exhibits (#1 and #2 attached hereto), showing the pairs, clusters and midsites in cartographic form leads this court to the conclusion that the rate of white nonparticipation was exacerbated by the unequal treatment of the parents and children and the administration of the plan. [2]

The above is not intended to suggest that white flight would be absent if the administration or the

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[2] Upon receipt through the referee's office of a letter from Dr. Gary Orfield that the above described execution of the plan would be a cause of coming disaster, an attempt was made by both the board and staff, and with the tacit approval of the court, to establish midway locations so that neither of the participants of some pairs would travel the entire distance to their paired school, but could meet at a halfway point. These locations, called midsites, exhibited the greatest white flight rate of all types of desegregation devices. In hindsight it is the opinion of this court that, this having been an extemporaneous and late plan, that many parents were given the perception that such temporizing indicated that the plan was failing, that the staff was incompetent and that there was no way that desegregation pursued in that manner could succeed. This violated the necessity that any plan should promise security and stability. (See Exhibit II-526, "Inequities in Pairs and Clusters: A Report by Gary Orfield," June 30, 1978.)

implementation of the plan had been handled differently. Every expert in this case has testified that white flight is to be anticipated with every mandatory desegregation order, but that its rate and duration depends upon identifiable factors, some of which can be controlled by the school district. Moreover, the white flight rate usually declines within a relatively short time after imposition of a plan. It is the court's conclusion that the white flight rate can be minimized by a recognition of these functions and a conscious attempt to control these factors.

In measuring white flight it should be noted that it is not clear that the numbers used by any of the experts in this case truly reflect the actual white withdrawal from the school system. The figures used in this case by the board's witnesses to measure white flight were the figures of nonparticipation in the cohort group within the affected grades. This testimony did not report the number of cohort students still in the system and the court doubts the accuracy

of the evidence which indicates that there were only 1,335 students on permit transfers from the affected grades and affected schools. To the extent that the actual non-participation of white children in the affected grades and schools is overstated, it is unknown and apparently undeterminable without the existence of a centralized student file (which is often referred to in this case as a "kid file") which has never been established in this district. [3] [4]

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[3] On May 1, 1980 and while the Intended Order was being written the court's Monitoring Committee issued its 15th report which seemed to indicate that the 1,335 figure should be increased substantially. The apparent discrepancy is probably explained by the unspoken and unasked for qualification inherent in the question asked of the board's witness.

[4] Apparently the individual student's file is maintained at the last school attended and not at any central location.

CONCLUSIONS AS TO THE BOARD'S PROPOSED ALL-VOLUNTARY PLAN

The inadequacy of the proposed components of the board's all-voluntary plan leads to the conclusions that this plan was hastily conceived during the course of the hearings, not thoroughly planned, and presented with the full realization by the board that of all the possible approaches to desegregation the voluntary plan would have the least success in desegregating the minority segregated schools; and that such an approach can only be rationalized by the absence of white flight from voluntary measures and the assertion that mandatory assignment is not justified by the facts or compelled by law.

The facts, however, divorced from the manner of administration and the degree of haste, upon which the requested modification to the plan rests, do not, even in the best of conditions lead to the promise of substantial or sufficient desegregation of the district.

GEOGRAPHICAL DESCRIPTION

In looking for reasonable and feasible approaches to desegregation of the LAUSD, the first consideration is its geography, which imposes limitations and requirements upon any planner. In area, it is the largest public school district in the United States. It has 710 square miles and includes within its boundaries the cities of Los Angeles, Cudahy, Gardena, Huntington Park, Lomita, Maywood, Vernon and San Fernando, and portions of 18 other cities and unincorporated areas in Los Angeles County. Its size is such that the entire school districts of Dayton, Denver, Pittsburgh, Cleveland, San Francisco and Boston would all fit within the district's boundaries, with space left over. (See Exhibit #57 and introduction to the board's March 1978 submission.) The distance from the southern part of the district to the northwestern boundary of Chatsworth is 58 miles and from the west to the eastern boundary more than 30 miles. It is bifurcated by the Santa Monica Mountain range which runs east

and west and which separates the suburban San Fernando Valley from the more central areas of Los Angeles. The white children who reside north of the mountains and in the San Fernando Valley comprise approximately 70% of all the white students in the district and approximately one-third of the total school census. From the central area into San Fernando Valley and return, there are three major freeway routes, all of which are used by the Los Angeles Unified School District buses almost exclusively over other routes. This insures that all travel times calculated between the locations in the two major areas assume freeway use to cover what in most cities would be regarded as great distances. This fact and the spatial distribution in the district of the various races and ethnic groups lead an observer to believe that there is relatively little natural connection between the two areas except for whatever communality is created by a common school board operating within far-flung but governmentally

recognized boundaries. As is evident from Exhibit 4 the boundaries are extremely irregular and not determined by geographic barriers. Nevertheless, this district and its history of segregation, as well as the prognosis for desegregation, can fairly be described as being partly the prisoner of the district's geography.

DEMOGRAPHY

Substantial and persistent differences exist among the various racial and ethnic groups residing in the Los Angeles area. Broadly defined, there are four large and easily defined groups: blacks, Hispanics, whites, and Asians. There are many smaller groups that also have strong traditions and senses of cultural identity. For school desegregation planning, the most important differences among groups concern their social and economic status, growth rates, and residential distributions.

Blacks and Hispanics in the Los Angeles area complete fewer years of schooling and work at less

prestigious and remunerative jobs, on the average, than do whites or Asians. The latest available statistics (for 1977) indicate that Asians are the most extensively educated, achieving, on the average, almost two years of college. Whites average about one year of education less than Asians, while blacks average about 1.4 years less than whites. The Hispanic population averages 9.2 years of schooling, or about three and one-half years less than whites and four years less than Asians.

The most recent available economic statistics (1976) report an average income of white families in the Los Angeles area of just under $16,000. Asian families received an income about $100 less than that of whites. The average income of Hispanic families was about $11,000, while black families had an average income of $9,800. Blacks were also reported to suffer the highest rate of unemployment among the four groups.

Turning to population trends, following World War II the black population of Los Angeles began to grow more rapidly than the white, rising from 5 percent in 1950 to an estimated 10 percent in 1977. Blacks have traditionally heavily concentrated in the central city; by 1977, blacks made up 18 percent of the city's population but only 6 percent of the suburban population.

The Hispanic and Asian populations began to increase more rapidly than those of both blacks and whites during the 1960's. The Hispanic population in 1950 made up 7 percent of the total population of Los Angeles and Orange Counties; by 1970 it had almost doubled to 12 percent, an increase from 305,000 to over one million. The Asian population rose from about 43,000 in 1950 to over a quarter of a million in 1970 increasing at a rate of 8 percent each year during the 1960's. Because of the rapid increase in the growth of minority populations, the white proportion in

the area fell from 87 percent to 75 percent during that decade in this two-county area.

General population growth in the Los Angeles area slowed markedly during the 1970's, particularly in the central city. But circumstances differed sharply between racial/ethnic groups. In all areas of the city, the white population declined while the Asian and Hispanic populations increased briskly and the black population grew at a slower rate. As a result, the city's white population dropped from 60 percent in 1970 to 50 percent in 1977. It is expected that the 1980 census will record that white residents of the city of Los Angeles are in a minority and that Hispanics, blacks, Asians, and other racial and ethnic groups together form a majority.

A high degree of residential segregation exists in the Los Angeles area but the extent of concentration varies by group. Asians and other smaller minority populations are widely dispersed throughout the city

and suburban ring, although they have some recognizable points of concentration. There is a large concentration of approximately one-quarter million Hispanic residents in East Los Angeles, which is the most highly segregated segment of the Hispanic population. However, East Los Angeles Hispanics represent no more than one-fifth of the area's total Hispanic population.

Blacks are residentially segregated to a much higher degree than are other minorities. The black population is heavily concentrated within South Central Los Angeles and the contiguous suburbs of Inglewood, Compton and Lynwood. Approximately 75-80% of all blacks in the metropolitan area, totalling more than half a million, live in those locations. Black families who live outside this area tend to live in smaller areas of black concentration in such places as Long Beach, Santa Ana, Pasadena, and Altadena.

The patterns of growth and distribution of the district's school population parallel general patterns of

population growth and distribution. Enrollment trends differ substantially by race and ethnicity. White enrollments have fallen in recent years while Hispanic and Asian enrollments have risen sharply, and black enrollment has been declining. The district has now moved from a predominantly white enrollment to a heavily minority enrollment.

In 1966, the district conducted the first racial and ethnic survey of its schools. According to that survey, the total pupil enrollment was 627,219, of which 351,817 students (56.1%) were white, 133,976 (21.4%) were black, 116,531 (18.6%) were Hispanic, and 24,134 (3.9%) were Asian.

The total school enrollment in the district increased until 1969 and has fallen since then, reflecting the trends in declining birthrates and out-migration from the city. In the fall of 1969, the district's total enrollment had risen to 650,324; ten years later it was only 83 percent as great.

In 1968, the year that this case first came to trial, the white student population had declined from 351,817 in 1966 to 347,967. The proportion of the whites in the district had fallen from 56.1% to 53.7%. In 1970, the proportion of the white student population was 49.9%, no longer a majority, but still the largest group in the student population. By 1977, the proportion of whites had fallen further to 33.7%; and, for the first time, whites were no longer the largest group.

The black enrollment reached its peak in 1971, and has declined each year since then. From 1971 to 1979, the number of black students in the district dropped from 156,003 to 130,315, a loss of 16% of total black enrollment. During this interval the proportion of blacks remained constant at about one-quarter of the total district enrollment. In the fall of 1979, black enrollment in the district was 24.1%.

By contrast, the Hispanic enrollment has continued to rise, almost doubling between 1966 and 1979. In

1977, Hispanics became the largest single racial or ethnic group in the student population, representing 34.9% of the total enrollment. By the fall of 1979, the Hispanic enrollment had risen to 41.8%. The Asian experience was similar, though on a smaller scale. The number of Asian students rose to 36,269 in 1979, an increase of 50% since 1966.

The 1979-80 racial-ethnic survey showed that of the 542,582 students in the district, there were 242,134 attending minority schools where the student body was composed of 90% or more of minority children.

Assuming that present trends continue, all experts consulted in the case agree that within four — or at the most five — years the student population in the district will be over 50% Hispanic. It is also projected that by 1987 white student population in the district will decline to approximately 14%, and black population will decline to approximately 18%. The Asian population may be expected to expand. These

trends, which reflect powerful and complex forces rooted in historical, social, and economic circumstances, are projected to exist regardless of the presence or absence of a court-ordered desegregation plan.

COMPUTER SIMULATIONS OF THE IMPACT OF VARIOUS PLANS FOR DESEGREGATION

Because of the size and complexity of the Los Angeles Unified School District, it became obvious to the court that it would be unable adequately to deal with the conflicting claims of the parties as to the relative efficiency of the various plans presented by them for desegregation of the district without independent and detailed analysis of the consequences of the alternatives suggested. The sheer numbers of schools, distances, students and combinations thereof were beyond the ability of the court to make any reasonable evaluation without computer-aided analysis. With the consent of the parties and upon the

advancement of the necessary funds by the respondent board, a private corporation was appointed as an expert to prepare a data base containing the necessary information, and to project the probable results of various plan prototypes and variations of the types proposed by any party or intervenor. Two series of simulations were produced to project the probable school-by-school results. These simulations provided the parties and the court with a better idea of the probable results of each basic prototype. Having received the results of the first round of simulations, the parties then proposed further variations, and the probable results were projected. In all, 36 different plans and variations were projected and the results published in Court's Exhibits II 201 and II 202.

The following is a description of these operations, the projections, and some general conclusions as written by the simulators, which, for the purposes of this order, the court adopts.

"Task

In the hopes of aiding both the parties and the court in weighing alternative plans and approaches to desegregation, the court, in 1979, ordered preparation of two series of computer simulations of variations on prototypical approaches to desegregating the Los Angeles Unified School District. The five prototypes selected, after consultation with the parties and intervenors, were the following:

1. An all-voluntary plan.
2. A voluntary/mandatory plan.
3. A voluntary/mandatory plan that makes use of available space in surrounding school districts.
4. An all-mandatory plan in which the concept of "combined minority" is replaced by specifications of individual races/ethnicities in patterns which can produce a desegregated school either in a biethnic or multiethnic mode.

5. An all-mandatory plan employing the conventional (white-combined minority) definition of desegregation.

The object of each simulation was to produce a systematic projection of the probable school-by-school consequences of adopting each variation on each prototype during the school years 1980-81 to 1984-85.

The first series of 17 variations reflected the first four the five prototypes listed above. All of these initial simulations were historically-based, in that none assumed any major discontinuity in behavior as against the patterns evidenced in the past. Each variation was formed on the basis of a digest of the proposals made through the years of litigation of **Crawford** although each was a conglomerate, and not a representation of (sic) proposal of any single party at any particular moment in time. The 19 additional variations contained in the second series were mainly comprised of amended versions of those in the first series; that is, most of the second series variations represented

applications of new assumptions or constraints to the simulations performed in the initial sequence. Some of these changed assumptions introduced non-historical behavior patterns (e.g., the absence of flight, a reversal in demographic trends) in order to test the effects of such discontinuities upon the patterns that would be produced on the basis of history alone.

In the broadest terms, all of the simulations were designed to respond to two basic questions put by this court:

1. What would have been the school-by-school results of demographic shifts in school population in the LAUSD area if the question of mandatory transportation for school desegregation had never arisen?
2. Given that this question in fact has arisen and has led to introduction and implementation of a voluntary/mandatory plan for two years, what would

introduction of each of the variations simulated produce during the school years 1980-81 through 1984-85 in terms of the following phenomena:

- The number of desegregated schools in each year.
- The number of segregated schools, divided into those that are Racially Isolated Minority Schools (RIMS) and those that are Racially Isolated White Schools (RIWS).
- How many pupils would be placed in desegregated schools?
- What would be the racial/ethnic composition of each grade and school level?
- How many pupils would be transported, and, within this figure, how many would be mandatorily transported?

- What would be the characteristics of voluntary desegregation (i.e., Magnet and PWT) programs?
- What would be the optimal number and specific identity of the groupings of schools (into pairs, clusters, and midsites) in the mandatory element of plans which contain such an element, if the objective were set at mathematical optimization of the number of desegregated schools in the district as a whole?
- What incremental dollar costs would be attributable to the desegregation effort?
- What would be the effect on programs for non-English-speaking (NES) and limited-English-speaking (LES) pupils?

Computer simulation is the only practical means of forecasting school-by-school consequences of programs which affect a student body of more than 500,000 pupils, arranged in an institutional configuration of more than 600 schools. Although theoretically possible, a noncomputer-aided calculation would be prohibitive in terms of time and resource requirements. However, computer simulation has necessary imperfections that must be recognized. It must assume standard patterns of behavior that vary only within a stated and limited number of possible ranges. It must follow every rule to the letter, whereas human administrators with broad experience and sensitivity to the system would doubtless introduce exceptions and other softening of rules where the circumstances require. As a result of these and other constraints, the simulations were not presented as precise forecasts of exactly what would occur if each variation were introduced. Rather, they represent a directional aid showing the basic pattern and order of

magnitude of change that might be expected, with the understanding that it is quite likely that the administrators involved would follow at least slightly different patterns in the way rules would in fact be applied.

Methodology

The simulations were accomplished through sequential applications of a series of mathematical sub-models which, taken together, constitute an overall model of the behavior of the school and pupil populations of the LAUSD. Nine sub-models were developed for the First Series, and a few additional and amended ones were added for the Second Series. They are described at length in the reports (which comprise well over 1,000 pages) that summarize the results achieved. In general, each is a mathematical technique by which information on the projected population and configuration of pupils is adjusted so as to reflect the effects of different assumptions and constraints. The simulation of each variation is

achieved by applying these sub-models in sequence, so as to replicate the process by which decision maker would presumably implement plans of varying descriptions and rules. The mathematical methodology employed follows standard established simulation techniques, although there was some innovation required. These techniques were subject to expert examination by agents of the parties, and received no detailed criticism or suggested amendment.

General Findings

As noted above, even a summary of the findings of the 36 simulations conducted occupies more than 1,000 pages. All that can be provided in this brief compass is a list of a few of the most sweeping generalizations that seem documented by the projections. And even these must be confined, except where specifically noted, to those simulations which assumed historically based behavior, as against those that assumed major discontinuities in historical patterns of behavior. If

historical patterns prevailed, the following general expectations are encouraged by the simulations:

1. A continuation of the demographic trends that have characterized the Los Angeles area for the past 15 years, even in the absence of any desegregation plan involving mandatory transportation, would have substantially reduced the share of white pupils in the LAUSD. The projections indicate that even if there had never been a mandatory desegregation plan introduced — and, therefore, no flight from such a plan — the proportion of white pupils would have shrunk to 20% (118,000) by 1984-85. All the simulations confirm that this long-term shrinkage in the white pupil population, if continued, will be the dominant factor in determining the feasibility of

desegregating schools in the district. The greater or lesser flight projected to be involved in one or another variation would make a noticeable difference in the first few years of the five-year projection, but the much greater long-term influence of demographic trends tends to make the results of all variations converge into the same relatively narrow percentage range of desegregated schools by the end of the projection period.

2. Accordingly, all variations that employ historically-based patterns of behavior would achieve their largest school desegregation effects in the first year of the projection, and be substantially less effective in this regard by 1984-85. None of the plans that employ the white-combined minority definition of

desegregation would desegregate more than 39% of the schools in 1980-81, nor more than 29% in 1984-85. The variations simulated that employ the multiethnic definition of desegregation would also fall below these maxima except where the multi-ethnic definition is structured so as to accept the possibility of desegregation of bi-ethnic schools by any two races/ethnicities, whether or not whites are present. Under the latter conditions, it is projected that the total of desegregated schools could achieve 45% in 1980-81, but would shrink by 1984-85 to 25%, well within the range achieved by plans using the more conventional definition of desegregation.

3. The situation with respect to the number of pupils placed in desegregated

schools by the variations simulated is quite similar, but on the whole a bit short of the pattern described by school desegregation. No historically-based variations, except the aforementioned version of the multi-ethnic plan, would result in desegregation of more than 33% of LAUSD pupils in 1980-81, nor more than 23% in 1984-85. The multi-ethnic plan that would permit any two races/ethnicities to desegregate a bi-ethnic school would result in 44% of the pupils desegregated in the first year, but this would shrink (to 23%) within the range of the other plans by 1984-85.

4. Virtually all of the desegregation achieved by any of the variations other than those of the multi-ethnic prototype would be accomplished

through reduction in the number of white schools, rather than any substantial change in the number of Racially Isolated Minority Schools (RIMS). The multi-ethnic approach would have a somewhat greater effect on RIMS in the first few years of the period, but the flight that is projected to result from such a plan would substantially reduce this differential effect as the period moved along. Also, the RIMS-reaching effects of the multi-ethnic approach would be achieved at the price of mandatory transportation of many more pupils than would actually be in desegregated schools. It would also impose a substantially longer average travel time upon whites, as compared with minority groups. Under all plan[s] applying the more

conventional definition of desegregation, however, all minority groups would have a substantially higher travel time than would whites.

5. With respect to grades and levels, the projections indicate that in general the proportion of pupils involved in desegregation would rise with each grade up to about the eleventh and then tail off. The highest proportion of pupils involved at any level would be likely to be in the upper reaches of junior high school. However, because there would be more elementary school pupils than those at other levels, the highest absolute number would be in the elementary grades.

6. All historically-base variations that employ a mandatory element would yield a higher percentage of schools

desegregated in all years than would any variation employing nothing but voluntary approaches. However, by the end of the projection period this difference may not amount to more than about 10% of the schools in the district. In order to achieve optimal use of the shrinking number of white pupils in the schools in ways that achieve the maximum number of desegregated institutions, the mandatory element of almost every variation that employs pairs/clusters/ midsites would require that these groupings be entirely changed at least once during the course of the projection period, so that virtually no pupils would be involved in the same pair, cluster, or midsite for more than three school years. Moreover, in order to avoid

mandatory transportation in instances where it achieves the desegregation of neither the sending nor the receiving school(s), many of the groupings that were announced would never be activated because post-announcement flight would invalidate them, and many of those that were activated in the first year or two would go out of existence during the second or third years prior to the general pupil reassignment. Therefore, the school which any particular pupil would attend would not in many instances be known until after the first day of the term when it was clear which of the pupils expected had turned up and which had not.

7. If the District attempted to avoid this in-and-out pattern of mandatory groupings of schools, and employed the

simulation process in order to "pre-shrink" the list of groupings and announce only those that showed the potential to survive for at least three years, the school desegregation results are projected to be at the upper end of the range outlined in point 2 above. However, it is not clear that this simulation is reliable, because it is questionable whether historical rates of pupil flight would apply in a context in which some fixed number of schools had been established as the only institutions in the system that would be subject to mandatory transportation at any time during the following 3-5 years.

8. With respect to the voluntary component of the voluntary/mandatory programs simulated, the definition of permissible district-wide magnet

schools proves to be decisive with respect to the incidence and importance of the magnet approach as a desegregation measure. All simulations were bound by the rule that only magnets that met the conventional white-combined minority desegregation definition would be permitted to form during the projection period, and only those existing magnets that contained at least 10% of whites and combined minorities would be permitted to survive. Under this rule, the simulations indicate that relatively few new magnets would be formed, and that the bulk of the magnet complement at any time would be made up of currently existing institutions that would be segregated. The net effect of magnet attendance, therefore, would be to

provide a segregated school experience. The numbers of pupils involved in desegregated magnets would be so small a proportion of the overall enrollment as to make virtually no district-wide statistical difference. The Permits with Transportation (PWT) program, on the other hand, would have some desegregating effect (on the order of 2% of the district schools), but would transport many more minority pupils to RIWS than to desegregated schools. It also would involve by far the longest average travel times among the repertoire of desegregation programs.

9. Fifteen minute differences in ceilings on allowable travel times for mandatorily transported pupils would not, according to the projections, change the overall average time spent

in travel by any substantial margin. Moreover, the desegregation effects of variations that differ only by such a difference in ceiling on travel time are exerted primarily only in the first three years of the period. After that the desegregation effects are quite similar. However, the imposition of different travel times does change the shape of the mandatory transportation program very considerably, with the variation employing a shorter travel time usually utilizing more clusters and midsites during the first three years of the period, and more mandatory school groupings in general during the last two years than would an identical plan with a higher travel ceiling. And, the composition of the school groupings that would be formed under plans that

were identical except for the difference in travel time ceilings would normally be very different indeed, so that very few of the pairs/ clusters/ midsites formed under one regime would exist under the other.

10. All historically-based variations except the multi-ethnic ones would result in the bulk of the travel burden being placed upon minority pupils, but would result in desegregated educational experiences for a very much larger percentage of white pupils than of minority ones. The multi-ethnic plans would reverse the proportion of transportation burden, but would also result in a larger share of whites placed in desegregated settings.

11. Simulation of variations which assume non-historical behavior do suggest some

general propositions about the relative importance and interplay among the principal constraints. Most important:

— Demographic trends are confirmed to be the most important single influence. The only circumstances under which the projections indicate that on the order of 50% of the schools could be desegregated and this level could be maintained or even slightly expanded over time are those in which the non-school related outflow of whites is reversed so that the total white school population in the district climbs.

— The second most important constraint would appear to be pupil flight, which exerts a

measurable influence upon the total of desegregated schools (on the order of 11% of all schools) in 1980-81. Put another way, if there were no flight, one could expect the desegregation effect of most variations to rise by about 11% of district schools in the first year. However, demography is projected steadily to overwhelm the importance of flight, so that by the end of the period this marginal effect would be reduced by more than half.

— Only when both the demographic and flight constraints have been relaxed does the importance of the ceiling on mandatory travel time begin to be visible. It appears that a 45-minute limit on

one-way travel would put a ceiling on achievable school desegregation in the 50-60% range during the first year even if the constraints posed by flight and demography were to disappear.

12. An area-wide resource utilization plan, built on any of the voluntary/mandatory variations simulated, would have virtually no effect on the number of desegregated schools within the LAUSD. Since the rules of these variations require that everything possible be done within the district before any pupils are transported outside, the resulting additional mandatory transportation is confined to pupils from RIMS moving into available space in suburban school districts. Because the variations provide that no

pupils be transported into LAUSD from the surrounding school districts, the result is simply to make the sending RIMS smaller, not to desegregate them. Thus, the desegregation result of an area-wide resource utilization program would be entirely expressed in terms of larger numbers of pupils in desegregated settings, not in larger numbers of LAUSD desegregated schools. Also, all variations simulated indicate that all pupils transported out of the district would be minority members, and that most of these would not be sent to desegregated schools. Rather, they would join a currently very small or nonexistent minority component in RIWS in numbers insufficient to transform these Racially

Isolated White Schools into desegregated ones.

13. Taking an austere view of the incremental dollar costs necessarily entailed in a strict reading of each variation (a view which, for example, would exclude just over half of the costs of the current plan that the LAUSD classifies as desegregation-related), the simulations project the following ranges of five-year total cost effects for the historically-based variations on each prototype:

(In millions of dollars)

Prototype	Five-year total cost effects in 1980 dollars	Average yearly cost	Five-year total cost effects in inflated dollars*
All-Voluntary	$178-207	$39	$209-260
Voluntary/ Mandatory	246-401	65	287-469
Multi-ethnic	548-596	114	637-693
Area Resource Utilization	347-417	76	408-499
All-Mandatory	225-317	54	263-371

*Inflation rate employed in estimation is eight percent per year.

14. The variations simulated diverge very little in their NES/LES effects, nor would any plan introduce NES/LES conditions markedly different from those now existent in the LAUSD. If sufficient bilingual teachers were available, pupils would be distributed in such a way that 95-96% or more of the requirements created by current State and Federal rules could be met. However, nothing in any of the plans would, per se, ameliorate the current situation in which the supply of such teachers amounts to less than half the number that would seem to be required by these rules. In short, there is no reason to expect any of the variations to make the NES/LES situation worse, but none would affect the major

problem afflicting current NES/LES programs."

The court finds that the inescapable deductions from these projections compel a somewhat pessimistic view of any permanent desegregation plan confined within current district boundaries being effective to reach most of the minority segregated schools in the Los Angeles Unified School District.

It is clear that if the Constitution requires a mandate on a governmental body to give relief to petitioners, such mandate must be directed to a body capable of granting relief. The limits of relief within the boundaries of Los Angeles Unified School District will have been reached with the contents of this order.

DEFINITION OF SEGREGATION AND DESEGREGATION

The findings of fact and law of this court were affirmed by the California Supreme Court, save for

the use of specific racial and ethnic percentages defining the scope of the respondent board's responsibility. In discussing the definition of desegregation in the context of requiring a school board to take steps to desegregate, the Supreme Court used the following terms, which seem to describe the manner of initial identification of minority isolated schools:

> . . . schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." (**Crawford v. Board of Education** [1976] 17 C.3d 280 at p. 303.)

The Court then went on:

> "Under the California Constitution, as under the federal Constitution, '[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff[,] and the community and administration attitudes toward the school, must be taken into consideration.'" **Crawford, supra**, at pp. 303-304.)

In footnote 16, the Court added:

> "Although, as we have emphasized, for constitutional purposes a school may be desegregated without being racially balanced, this does not mean that reference should not be made to the racial composition of the district as a whole in determining whether a given school is segregated or not. Thus, for example, in a school district in which 'minority' students significantly outnumber 'majority' students, a school whose racial composition might in some other district make it a 'segregated school' may not warrant that legal characterization. Unquestionably in many situations the determination of whether a given school is 'segregated' or not, under the above guidelines, will be a difficult decision, but we believe the variety of factual settings existing throughout our state foreclose a more rigid or concrete definition." **Crawford, supra,** at p. 304.)

It is important to remember that the context of the decision of the California Supreme Court was based on 1970 findings when the racial composition of the Los Angeles Unified School District was a little more than 50% white and nearly 50% minority, and which minority at that time was more evenly divided between blacks and Hispanics than it is today. As of this date, using the October 1979 racial and ethnic

survey, the white student population had dropped to 27%, the black student population had stayed fairly stable at 24.1%, the Hispanic student population had grown to 41.8%, and the Asian population was 6.7%. More significantly, it is the estimate of all experts that, regardless of any other factor, even including white flight, the demographic projections for the Los Angeles Unified School District indicate that in five years the white population will be reduced to 15 or 20% of the total school population. (See Farley, November 14, 1978, and First and Second Simulation Series, Hamilton, Rabinovitz & Szanton.) Indicative of the validity of this projection is the October 1979 Kindergarten enrollment wherein the white students comprise only 17%. This, of course, is the predictor of the white student population when that cohort passes through the next twelve grades.

In the context of those undisputed facts, this court and the parties have spent much time in attempting to obtain workable definitions of segregation and

desegregation which can be readily applied by the school district and this court in its monitoring activities and still be within the **Crawford** definitional statements.

The parties have basic sociological and philosophical differences as to what measures are true indices of segregation and desegregation, and how to alleviate and overcome, within racial and ethnic groups, the harms of racial isolation. For example, if the alleviation of harms of segregation is to integrate the minority student into the majority mainstream so as to achieve and make the most of his life chances through contact and interjection into the majority power structure, then the composition of a school would have to be made in such a manner that the minority student would have the maximum contact with white students. Thus, a higher ratio of white students would be important. If, on the other hand, the process of desegregation is to erase the perception of a school's identity as a minority isolated school, it is possible

through the multi-ethnic definition proposed by the petitioners to desegregate more schools with smaller numbers of white children.

Both sides recognize the difficulty placed upon the district by the diminishing number of white students in attempting to reach any of the goals by any method approved in **Crawford.** The board's voluntary plan seeks to preserve the white school's identity and yet permit contact by the minority child with those white students in the predominantly white schools through the use of the PWT program. This program is described in other parts of this order. Simply put, this means that the minority child is transported to the white school and the white character of that school is maintained. The district argues that while such a program does not desegregate minority schools, it affords more minority children better opportunities for contact with white children and thus better alleviates the harms of racial isolation than would any other means, while also eliminating white flight. The

petitioners argue, however, that in any remedial action the desegregation of existing schools is the goal, so that their perceptual characterization as minority schools may be erased. They assert that this is best done by the introduction of white children into those schools.

These differing views are mentioned only for the purpose of showing that the resolution of the issue of definition is the linchpin of the remedial portion of this case.

Faced with the bleak fact that the number of white children is rapidly dwindling, the petitioners have proposed a definition which rejects the concept of "combined minority" and classifies each student by his specific racial or ethnic dominant characteristic, such as Hispanic, black, white or Asian. The petitioners argue that the effect of this characterization would be that perceptions of the school would focus on subclassifications instead of on total minority or combined minority. This change of focus, it is

argued, will eliminate, or at least substantially alleviate, the harms that are created by the former perception that the school was minority segregated. Accordingly, petitioners and intervenor, Project Integration, argue that the requirement of **Crawford** is to erase the perception of each minority school as a black, Hispanic, or Asian school by the introduction of white children only to the extent necessary to remove the perception of segregation by identification of a specific minority group. This would seem to mean that whites should constitute a plurality of the largest of the minority groups present in the school. For example, a school 31% black, 32% Hispanic and 37% white would not be a segregated school even though 63% of the students would be classified as "combined minority" if that concept had been used, but would be segregated if the 63% constituted one minority group.

This court is led to the conclusion that any definition has meaning and form depending upon the

available numbers in each racial and ethnic group, and depending upon the use of the definition.

The first use of a definition is to identify schools suffering the harms of racial isolation. There are 283 minority schools in Los Angeles that would have 70% or more of their student population which is either black, Hispanic, or a combination of both if the present pairs, clusters, and midsites are abandoned. [1] Under any approach advanced in this case, these numbers compel the identification of all such schools as segregated. The number of these schools that could be desegregated under the most efficient of programs would still leave untouched very large numbers of minority isolated schools. (See Simulations, First and Second Series, Hamilton, Rabinovitz & Szanton.) Therefore, it has little importance to these schools which of the two definitions should be used for the

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[1] These figures refer to school populations if their populations included all students who reside within their attendance boundaries.

purpose of identifying minority isolated schools which presumptively are the result of the past segregative acts of the respondent board. Accordingly, to tailor any definition for use at the identification stage of the remaining proceedings, other than to use the Supreme Court's broad definition, is superfluous. The phase of the case where definition becomes important, however, is in prescribing the numbers which make up desegregated schools reconstituted by any desegregation techniques.

The testimony as to a desegregated school containing only two racial/ethnic groups is unanimous that white students should be present in substantial numbers and, if possible, in the majority.

The testimony as to the multiethnic desegregated school is clouded by the circumstances under which the proponents seek to implement that definition. That testimony produced apprehension in this court's mind that the use of this definition, while of great value because of its realistic approach to the rich and varied

ethnic mixture in the Los Angeles Unified School District, posed an unfeasible and unreasonable demand upon the logistics, transportation, and finances of the district, while transporting very large numbers of pupils without desegregating either their sending or receiving schools. These factors compel total rejection of that definition, if applied on a district-wide basis. (See Simulations, Second Series, Hamilton, Rabinovitz & Szanton.)

The court, however, believes that if the scope of application of this definition could be reduced to smaller geographic areas, and the logistics simplified, the advantages of this definition could be realized. It is the court's intention, therefore, to adopt as a working definition of a desegregated school containing only two racial/ethnic groups, one with a simple majority of white students, plus or minus 10%. In those areas where there are sufficient numbers of minority groups and the practicalities of the situation make it reasonable and feasible, the court intends to adopt a

definition of a multi-ethnic desegregated school which would require a plurality of white children, plus or minus 5%, over the largest of any of the minority groups present. The white complement in a desegregated school may not exceed 10% more than a majority in a bi-ethnic school or 5% more than a plurality in a multi-ethnic school.

The demographic projections for the district are such, however, that many schools initially desegregated will not remain so for more than three years. A rigid extension of these definitions would require that the district redraw attendance boundaries, reconstitute schools and abandon the desegregated status of other schools in an attempt to achieve strict adherence to the formula. It is this court's belief that once the reconstitution has taken place a school may or may not have become truly integrated within that time period, depending upon the efforts of the school staff, the skill of administration, cooperation of parents, the quality of education, and the nature of the

neighborhood. It is conceivable that at the end of those three years, even with the demographic changes envisioned, the school may have effectively created the perception in the community that it is integrated. If so, there would be little need to address the harms of past racial isolation by further reconstitution unless the number of white children is so small that there can be no agrument that the school is not a segregated minority school.

This court is not attempting to violate the rule in **Pasadena City Board of Education v. Spangler**, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), but is attempting to set forth a course of action for the board in the relief of prior judicially-determined harms of segregation in light of the demography of the district.

Both the court and the respondent board have recognized that the alleviation of harms and the remedy therefor must be addressed by an inspection and inventory of the harms in each school. The board

is directed to prepare such an inventory as to each school included in the desegregation process and to make periodic evaluations of the progress or non-progress of the integration process so that the board can make a reasoned judgment, subject to approval by the court, upon the occurrence of those changes in demography, to continue that school in its present configuration or to again reconstitute it.

SEGREGATION AND ENGLISH LANGUAGE USE LIMITATIONS (LES/NES)

The evidence in this case has convinced this court that most students with an English language difficulty arising out of its use as a second language are in minority segregated schools in this district. Because of such segregation, that deficiency is difficult to remedy through peer association with white children, and it is a harm intensified by minority isolation. If this conclusion is correct, then a program for the alleviation of such harm should be included in any plan

for desegregation. Such program should provide for the teaching of skills in the primary language of the child and at the same time teach "English as a second language." The facts upon which this conclusion is based are to be found in the enrollment figures of minority children whose native language is foreign, and in the counts of non-English-speaking and limited-Engligh-speaking students as set forth in the Testimony (Transcript, Volume 72, page 10482). Those data show that of the approximately 225,000 Hispanic students classified within the purview of this order as minority children, about 85,000 are NES (non-English-speaking) or LES (limited-English-speaking). These children, who comprise 85% of all LES/NES students in the district, are mainly concentrated in 93 Hispanic elementary schools. The impact of these concentrations of Hisanic students results in most of the overcrowding in the school district. These areas where these schools are located are ports of entry for continued Hispanic in-migration, and because this

concentration of Hispanic students results in isolation from Engligh-as-a-primary-language students, the child's learning ability suffers unless he is given basic education skills in a language which he understands, while at the same time being given an opportunity to learn English.

Both the United States Supreme Court and the State of California [1] have recognized the necessity of bilingual instruction to prevent the loss of the child's educational opportunities in the public schools. It would seem axiomatic that the proficient use of English is important for integration into the mainstream of society and to take advantage of the opportunities available within the majority society. Further, it would seem logical that the ability to learn the basic skills is necessary to this integration. The language handicap, chronic overcrowding in the

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[1] **Lau v. Nichols,** 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) and Education Code § 52160 et seq., otherwise known as the Chacon-Moscone Bilingual-Bicultural Education Act of 1976.

Hispanic schools, and the segregation of these children cannot be considered separately. Any plan must address all three in a way that promises a comprehensive solution. In the past, the Los Angeles Unified School District has declared itself unable to meet the requirements of bilingual instruction as required under **Chacon**, and has attempted to be relieved of the **Lau** requirements, as enforced by the U.S. Department of Health, Education and Welfare (HEW), through waivers of enforcement.

The primary barrier to meeting the bilingual instruction requirements is the recruitment of bilingual teaching personnel. Only about 44,000 of the 99,000 LES/NES students are now participating in any bilingual instruction, leaving a shortfall of 55,000 LES/NES students who are nonparticipants. Assuming that it is correct that there is a "critical mass" necessary for bilingual instruction (see report of court's expert, Beatrice Arias), and further assuming that a class of 27 pupils of whom 18 are LES/NES is

necessary for efficient instruction, the current shortfall of teachers is at least 2,000, taking into account the probability of the desegregation of some of these schools. However this figure may be cut through the use of aides and other and different forms of instruction.

Petitioners have suggested as cures for the shortfall certain actions that will:

1. Revise recruitment standards;

2. Provide in-service instruction to existing mono-lingual teachers, allowing them to qualify for bilingual certificates; and

3. Provide an incentive pay schedule to recognize bilinguality as a compensable skill.

The court is not certain that these proposals are the limits of available remedies but suggests that solutions be searched for in other forms as well. The need is acute. It is almost incomprehensible how those 55,000 students unable to communicate adequately in English can acquire the knowledge and skills necessary

to effective competition in the economic marketplace.

The briefs of the parties in this case indicate that this is a problem which should be solved in connection with the desegregation of the district, but their approaches differ. The petitioners seek a fiat that the court mandate incentive pay; eliminate seniority rights for assignment to bilingual duty; and maintain a separate hiring and lay-off policy for bilingual teachers as opposed to those applied to other teachers; this so as to maintain the continued employment of bilingual teachers and to allow unrestricted transfers not subject to union or seniority rules. The court feels that these suggestions can best be determined by a labor agreement between the intervenor, United Teachers of Los Angeles (UTLA), and the school board. Failing such agreement, the court reserves jurisdiction to make such other and further orders as are necessary to alleviate the described harms. It is understood that UTLA has submitted itself to the

jurisdiction of this court as to all reasonable and feasible orders made respecting desegregation.

Petitioners' brief suggest[s] other and further specific orders that would require clustering LES/NES students in the desegregation plan so as to insure that they are represented in sufficient numbers in the receiving school or in their home school as to require bilingual instruction under **Chacon**. Petitioners also suggest that there be a program of comprehensive collection of data on NES/LES bilingual teachers by grade level, pairs, clusters, areas and language so that pupils and teachers can be properly identified and placed. These requests appear reasonable and practical. Petitioners request that the existing **Lau** elements agreed to between the district and federal enforcement agencies (HEW) be made a part of this order. It is not the function of this court to enforce the **Lau** agreement, but it is the intention of this court to incorporate as a minimum standard of bilingual instruction the **Lau** standards in any plan. Further, it

is the conclusion of this court that bilingual instruction of minority isolated students is a necessary part of any desegregation order and the court now adopts the present standards as set forth in Article 3 of Chapter 7 of the Education Code beginning with Section 52160 and continuing through §52179, with all the amendments now presently in force, as the standard for the alleviation of the harms of isolation suffered by minority students with a foreign language as their primary language. Any subsequent diluting of those standards which would provide less bilingual instruction in Los Angeles by reason of any act of Legislature shall not diminish this bilingual instruction requirement without further order of this court.

RACIALLY ISOLATED MINORITY SCHOOLS (RIMS)

It is this court's observation that the impact of racial isolation is and has been most severe in those schools which cannot be desegregated by this order or

any other order prescribing reasonable and feasible measures and confined within the present geographical limits of the Los Angeles Unified School District. Because of this, the most difficult of problems facing the district and this court is the formation of a program to alleviate, if possible, the harms of racial and ethnic isolation suffered by students in those schools. In recognition of this, on June 21, 1979, an order was made by this court, denominated "RIMS Order," which set in motion certain programs, including an urban teacher incentive plan, which seem to have been of some value. Further, the order identified the then RIMS schools which were the subject of that order and program. Because of the order of this date, many factors of that order may not now be relevant. Because of the importance of this program and the modification which may be necessary by reason of the effect of this order, the court feels that it is necessary to hold a further hearing and now makes no further order except as is set forth in the

guidelines herein and to continue such existing orders as are now in effect pending further hearing thereon. This hearing shall be calendared by the petitioners on the same date as is now set for the hearing on the respondent board's "Overcrowding Plan."

GENERAL PURPOSE OF FURTHER BOARD AND COURT ACTION AND SCOPE OF THE COURT'S GUIDELINES

Because of the limited success of the plan which is now in operation and the rejection of the proposed voluntary plan and the finding that the respondent board has not embarked on a course of action which will eliminate segregated schools and is not likely to do so, the court has the unpleasant duty of setting forth guidelines for a plan which it hopes will desegregate the Los Angeles Unified School District in a manner as to include as many racially isolated schools as is reasonable and feasible and which will include, within those participating schools, grades 1

through 12. These guidelines are intended to be the strictures within which the board is directed to act, and this court will not approve any plan that does not conform to these guidelines unless good cause is shown and upon timely application.

The board is now ordered to prepare a plan pursuant to the schedule herein, and which will be instituted in September 1980 for the school year 1980-81. The board is further instructed that time is important to all the parties, the children and the parents of the district, as well as to this court. For that reason development of this plan shall have first importance in all business coming before the board. The staff of the district shall be instructed by the board that their first priority shall be the development and implementation of a plan consistent with these guidelines.

It is the general intent of these guidelines to desegregate, insofar as external factors will allow, as many schools as is possible, consistent with the

Supreme Court's directive that a plan be reasonable and feasible. To do this, the court recognizes that racial and ethnic minorities have differences which may require different treatment; that there exist neighborhoods and communities which are different from each other; that the creation and maintenance of multicultural communities are important; that a plan must provide for reasonable stability and certainty and require that the burdens will be borne as equally as possible by all participants. The court further recognizes that existing provisions for escape from these burdens create an element of unfairness in administration and should be abolished. The court further recognizes the necessity of credible and fair implementation, along with competent monitoring to allow updating and proper evaluation. The court further recognizes that the basic administration of the plan should be left wth the Los Angeles Unified School District, as the court believes that the staff, given directions and guidelines, will be able to effectively

create and carry out a plan within these guidelines. Lastly, knowing the impossibility of creating any plan which would, within the geographical limts of the Los Angeles Unified School District, include all minority isolated schools, the court recognizes that many such schools will not be touched by the desegregation process and so directs that the plan must contain equality in all possible instances between those schools included within the desegregation process and the minority isolated schools. This will include equality in the concern of the board for all students; equality of expenditure per student for desegregation and alleviation of isolation; equality in staff quality and staff training; equality in equipment and structures; and equality in education programs.

To accomplish desegregation within these guidelines, the court herein directs that the district be divided into eleven areas (see Exhibit #4 attached), seven of which are expected to contain the demographic characteristics necessary for desegregation,

and the other four remaining are expected to be substantially unavailable for desegregation through reasonable and feasible means. (See Exhibit #3 attached.) Any mandatory desegregation program implemented will include as eligible all elementary schools and grades, except Kindergarten; and all junior high schools and high schools. The desegregation process shall start forthwith in the elementary and junior high schools, including appropriate adjustment of attendance boundaries, feeder patterns and student assignments. The students in the present high school (10th, 11th and 12th) grades will be allowed to enroll and graduate at their present schools. Mandatory provisions for high school desegregation programs will begin with the pupils entering the 10th grade commencing in 1981-82, the 11th grade beginning in 1982-83 and the 12th grade beginning in 1983-84.

The board will be allowed to devise individual desegregation plans for each area as long as all are consistent with this order. Community input is

encouraged to allow choice of forms of desegregation techniques. The present district-wide magnet programs will be allowed to continue provided they meet these guidelines and are desegregated as defined herein. District-wide magnets which are presently not desegregated shall be terminated forthwith, save for those in areas herein numbered 7, 8, 9, 10 and 11.

The PWT program may continue. PWT participation may be offered only after mandatory student assignments have been made, and will be available only to those students who are not mandatorily assigned. No student shall be exempted from mandatory assignment because of his acceptance into the PWT program. Neither shall any PWT student be counted as a resident for purposes of exempting the receiving school from participation in mandatory desegregation programs. Further, no PWT student shall be permitted to segregate any school that would otherwise be desegregated.

The guidelines also provide for an evaluation of the integration process in each school. These guidelines further envision that there will be no transfers for desegregation purposes in any mandatory program which will cross the boundaries of the areas.

This court is painfully aware of the circumstances which result in the use of these guidelines and which will leave large numbers of minority isolated schools unable to be desegregated. These circumstances are achieved by factors beyond the control of this court: (1) the demography of the district and the placement of the various ethnic and racial groups, and (2) the immense distances between such ethnic and racial concentrations.

In an attempt to deal with these obstacles the primary factor in designing the zones is to make the most efficient distribution of increasingly scarce white pupils as possible. Every predominantly white school will be involved in a desegregation plan. The real option available to a planner is not which white school

but which minority school will be included in any plan. In each instance the areas prescribed herein were drawn so as to eliminate unduly long distances and to maintain as much as possible a sense of community and familiarity so as to preserve and maintain the resulting desegregation as well as minimizing the effect of white withdrawal and natural demographic change. These designs were chosen after examining the history of two years of desegregation in the district and the computer simulations. [1]

To insure compliance with these guidelines and to report to the court periodically as to whether these guidelines are being complied with, the court intends

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[1] It is the personal belief of this court that subclasses of minority isolated schools should be created pursuant to both student need and desegregation effectiveness so that a priority may be established for the desegregation of minority schools. This would be of value in helping solve the painful dilemma of a court in the choice of minority schools to be included in any limited plan restricted by demography. This approach was suggested to the parties during the course of the trial but not acted upon by them. Such an approach might be useful in many other districts similarly situated.

to appoint Edward Hamilton and Francine Rabinovitz as special monitors, whose duties are set forth in this order. The monitoring committee will continue but will report to the court's special monitors. The office of referee heretofore used as the "eyes and ears" of the court will, therefore, no longer be needed. The court is grateful to Monroe Price, Esq., for his valuable service as referee during the past three years.

GUIDELINES FOR THE FORMATION OF AREA DESEGREGATION PLANS

I. GROUP CLASSIFICATIONS

The classifications for desegregation shall be based on identification of the predominant ethnic and racial character of each student and shall be limited to one of four groups: (1) Hispanic; (2) white; (3) black; and (4) other minorities, of whom Asians/Pacific Islanders constitute a large majority, but in which group other minorities are included.

II. DEFINITION OF A DESEGREGATED SCHOOL

The court adopts as a working definition of a desegregated school containing only two racial/ethnic groups, one with a simple majority of white students, plus or minus 10%. In those areas where there are sufficient numbers of minority groups and the practicalities of the situation make it reasonable and feasible, the court adopts a definition of a multiethnic desegregated school which would require a plurality of white children, plus or minus 5%, over the largest of any of the minority groups present. The white complement in a desegregated school may not exceed 10% more than a majority in a biethnic school or 5% more than a plurality in a multiethnic school.

III. AREAS

For the purpose of desegregation, the Los Angeles Unified School District shall be divided into eleven (11) separate areas. These areas are delineated on the map

attached hereto as Exhibit #4. Changes in these area boundaries may be made only upon motion brought within fifteen (15) calendar days from the effective date of this order and only upon grounds that any change will more effectively accomplish desegregation, preserve participation, and equalize the burdens upon and advantages to the affected schools.

IV. RESTRICTIONS ON TRANSFERS

Except as set forth herein and unless good cause is shown, no student assignments will be made, nor transportation given across area boundaries for the purposes of desegregation. It is the intent of this rule to provide as much stability to each area plan as is consistent with the mandate.

V. CONTENTS OF PLAN

For each area, there shall be prepared a plan either for desegregaton or for alleviation of the harms

of racial isolation. Each area plan may differ from the others in the techniques used, as long as the goals described herein are achieved. Each area plan shall be separately approved by the court. Each plan shall contain the detailed plans and schedules to be used for implementation. No school containing students of only two races/ethnicities may be exempted from reconstitution unless its complement of white pupils falls below 50%. In reviewing each area plan, the board will estimate and the court will consider how each relates to the other plans and to the district-wide effect.

VI. COMMUNITY AND PARENT INPUT

The board is directed to provide a mechanism for the receipt and use of community, staff, and parent communication directed toward the formation of such plans, and to give such communication serious and responsive consideration. The design and detailed

description of this mechanism shall be filed with this court by July 15, 1980.

VII. PLAN POTENTIAL DETERMINATION

The plan for each area shall be transmitted by the board to the court within forty-five (45) calendar days of the effective date of this order, and shall have as a goal desegregation of 90% of the maximum number of schools which a computer-assisted simulation will show as possible to desegregate during each of the years 1980-81 through 1982-83. Such simulations shall be provided by the board and be subject to the review of this court. Care shall be taken to preserve all schools which are already desegregated without the application of any plan, with the above-noted exception of bi-ethnic schools containing between 50% and 60% white students. Further, the plan shall set forth precisely the technique and procedures to be used in each area and the results expected in each year from each measure.

VIII. SYNCHRONIZATION OF PLANS

Each area plan shall also show the administrative arrangements for implementation. However, each area shall have an identical schedule of main events (e.g., date of student assignments, etc.). Such area plans shall provide for the assignment of students to the various schools withn each area as needed for the purpose of complying with desegregation objectives, save as set forth in the following paragraph.

IX. VOLUNTARY TECHNIQUES

Voluntary techniques may be used, if they:

(a) result in desegregation of schools;

(b) do not lessen the effectiveness or the equity of the mandatory programs;

(c) are equally accessible to students of all races and ethnicities;

(d) are not relied upon to desegregate more than 15% of the schools to be desegregated in

each area under this order.

This limitation on voluntary techniques may be increased by the court subsequent to the year 1980-81 if the area's voluntary program proves successful in that it has a clear record of achievement in terms of these guidelines.

X. SCHEDULE OF IMPLEMENTATION

All students in grades 1 through 9 are and shall be available for mandatory reassignment for purposes of desegregation commencing 1980-81. All students presently in grades 10-12 shall not now be reassigned for the purposes of desegregation, as grades 10-12 will be desegregated in increments commencing 1981-82. The schedule for desegregation of high school students is:

Grade 10 - 1981-82

Grade 11 - 1982-83

Grade 12 - 1983-84

XI. IMPLEMENTATION STAFF

The board is directed to preserve or create, with such reductions or augmentations as may later be found necessary in each area, the school and area teams necessary to facilitate formation and operation of groupings of schools for desegregation purposes, and to establish similar special arrangements for alleviation of the harms of racial isolation in RIMS. The board's plan and budget for compliance with this directive shall be deposited with the court at the same time as the proposal for a mechanism to gather and incorporate parent and community opinion into the planning process.

XII. SPECIAL SCHOOLS

Special schools may be included or excluded by the board from provisions of the plan, subject to the approval of the court.

XIII. PRESENT PAIRS, CLUSTERS AND MIDSITES

Present pairs, clusters and midsites in which some member schools are desegregated and promise continued desegregation with the addition of grades 1-3 and 9, and with the consent of the participating schools, may remain in their present configuration even if this involves transportation across area lines. Because the areas cannot plan until these continuing groupings are identified, the board shall determine their identity and report it to the court within twenty-one (21) calendar days of the effective date of this order.

XIV. FEEDER PATTERNS AND ATTENDANCE BOUNDARIES

Feeder patterns and attendance boundaries shall be reviewed by the board and adjusted to best combine

the desegregation effort and the continuity of the student cohorts.

XV. TRANSPORTATION TIMES AND BURDENS

The average mandatory travel time for any racial or ethnic group shall not be substantially greater than for any other group, and shall be determined by the time required to travel between the sending and receiving schools. The board is encouraged to discontinue neighborhood pick-up where possible and to provide transportation only school-to-school.

XVI. PERMITS WITH TRANSPORTATION (PWT)

The PWT program may be continued as a residual component of a plan, and participants may cross area boundaries. Present PWT students and new applicants, other than those in the temporarily unaffected high school grades, may participate in the program only if:

(a) Mandatory assignments have been made prior to their acceptance into PWT, and they have not been assigned; and

(b) Neither their sending nor receiving school will be made segregated by their participation in PWT.

XVII. DISTRICT-WIDE MAGNET SCHOOLS

District-wide magnet schools that have become desegregated, according to the above definition, during the School Year 1979-80 may continue on a year-by-year basis for so long as such magnet schools continue to be desegregated. Those located in the areas herein designated as 7, 8, 9, 10, and 11 need not meet this desegregation test. No new district-wide magnet schools for the purpose of desegregation may be commenced without specific consent of this court. Magnet schools are not prohibited within areas. In the areas designated 7, 8, 9, 10, and 11, new magnets may be formed that are not desegregated where it is

demonstrable that they will contribute to alleviation of the harms of racial isolation.

XVIII. RACIALLY ISOLATED MINORITY SCHOOLS (RIMS)

The court has scheduled a separate hearing on approaches to be taken to alleviate the harms of racial isolation in RIMS, most of which cannot be desegregated by any plan employing reasonable and feasible means. These approaches will be the subject of a separate order, pending which all existing orders remain in effect. It is here directed, however, that the desegregation plan prepared by the board provide for equality of treatment for RIMS and for RIMS students in all ways possible. This will include equal concern by the board for all students and their schools, equal incremental expenditure per student for desegregation and/or alleviation of isolation, equal staff quality and staff training, equal equipment and structures, and equal educational programs.

XIX. CENTRAL STUDENT FILE ("KID FILE")

To provide ready access to information as to its efforts and to aid the monitoring of the court, the board is directed to construct a file for each student ("Kid File") centrally located and easily accessible, containing the basic information needed for effective desegregation planning. All parties have agreed that the absence of such file is an obstacle to efficient planning and monitoring activities.

XX. DESEGREGATION IMPACT STATEMENT

No capital improvement, major teacher assignment policy, grade grouping, attendance boundary change, feeder pattern change, major curriculum change, or other significant departure from current practices shall be made without an evaluation and a finding by the board of its effect upon segregation, desegregation, integration or resegregation, and

reporting the same to the court of that effect and impact on the mandate and these guidelines.

XXI. INVENTORY OF INTEGRATION PROGRESS

No general revision of mandatory reassignments shall be made until after the School Year 1982-83, unless upon a showing that desegregation is impossible in a particular configuration of students and schools by reason of factors beyond the control of the board. The board is encouraged to build confidence between the students, parents, and administration of the grouped schools so that the configurations are stable within that time frame.

The board is directed to establish an evaluation procedure in order to evaluate each school as to the effect of the desegregation of alleviation programs upon reducing the harms of racial isolation. This evaluation shall be made not less than once a year and the results of such evaluation shall be made available

to the court and to the public. The first evaluation shall be made no later than June 1981.

XXII. COURT MONITORING AND SUPERVISION OF IMPLEMENTATION

(a) The court intends to be fully informed throughout the planning procedure and the implementation. In order to do this, the court has and now does appoint special monitors, which monitors will be authorized and requested to:

(i) Observe on behalf of the court all planning, budgeting, administrative, and other activities undertaken in preparation and implementation of the new plan.

(ii) Provide, subject to the parties' access to the court, immediate interpretations of this order where they may be necessary for planning and implementation purposes.

(iii) Require and set time limits for receipt from the board and/or district staff of any data, special analyses, internal reports and memoranda, or other information necessary, in their judgment, to effective performance of the responsibilities given them in this order. This includes the authority to convene meetings of named district staff personnel.

(iv) Receive, comment upon, and transmit to the court all progress reports, applications for change, and other communications from board to court concerning desegregation issues.

(v) Assess and make recommendations to the court concerning the merits of all proposed plans, implementation schedules, financial allocations, and other steps suggested by the board to carry out this order. The special monitors are authorized

to immediately and ex parte recommend to the court delay of any board or staff action and insist that it be submitted to the court for review if in their judgment the action would result in noncompliance, undercompliance, or other impairment of the effects of these guidelines.

(vi) Prepare independent reports and proposals to the court.

(b) The board is directed to include the special monitors in all activities significant to preparation and execution of the desegregation plan. A showing that the special monitors have not been consulted to the degree they think necessary in order to offer sensible advice to the court will be sufficient ground for the denial of any proposed change or other action requested by the board.

(c) The special monitors will be compensated a reasonable fee and provided all necessary costs and expenses required to carry out the terms of this

order. Such payment will be made in the same manner and in the same method that is used to defray the expenses of the present monitoring committee, and one comprehensive budget will be submitted to the court forthwith for the monitoring committee, and the special monitors, and sufficient funds to meet that budget, when approved by the court, shall be deposited in the same manner as set forth in the minute order dated June 21, 1979. The special monitors shall not be personally liable for any action or failure to act in the performance of their duties. All prior minute orders inconsistent with this paragraph are superseded by the terms herein.

(d) The appointment of the special monitors cannot relieve this court of any decision-making, and the appointment is made for the purpose of aiding the court in gathering information and being the "eyes and ears" of the court during the planning and implementation period, nor does the appointment relieve the respondent board of any responsibility established by

any law, decisional or statute, or any order of this or any other court.

XIII. SUMMARY OF SCHEDULE

(a) Board must submit a new plan consistent with the above guidelines within forty-five (45) calendar days after this order. (Proposed changes in the new areas within the district must be submitted within 15 calendar days.)

(b) Court will rule on the proposed plan within five (5) calendar days after receipt.

(c) Final pupil assignment and other administrative guidelines must be communicated to parents, teachers, and administrators by August 26, 1980.

* * * * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because of convenience and this court's desire to make the findings of fact and conclusions of law more

coherent and understandable to the parties and any reviewing body, the preceding narrative statement contains facts which are now adopted by this court and found as true, as well as the conclusions of law which have been made by this court. However, from those facts which were relied upon by the court in arriving at its opinion and the conclusions of law which were made by the court, certain selective findings of fact and conclusions of law are set forth in numbered form below, but are not to be considered as exclusive of the facts stated in the narrative opinion nor exclusive of any conclusions of law stated therein. This form of findings and conclusions is adopted solely for the purpose of convenience.

FINDINGS OF FACTS

The court further finds as facts:

1. That the complaint in this matter was filed August 1, 1963. That a mandate to desegregate the segregated schools of the district was issued May 12,

1970 and affirmed in 1976 by the California Supreme Court.

2. That on March 18, 1977, the respondents filed their response in the form of a plan which upon hearing was found by this court to be wholly ineffective in complying with the manddate. That such finding is set forth in the Minute Order of July 5, 1977.

3. That by the terms of that Minute Order respondent was directed to return to this court a new plan and to comply with the mandate and with terms certain.

4. That respondent filed its second plan on October 3, 1977, supplemented in December with a declaration by the board's president and further supplemented by the board's answers to 22 questions propounded by this court.

5. That on February 7, 1978, this court provisionally approved that plan, even though it found that it did not fully comply with the mandate or the orders subsequently issued in aid of the mandate. That this

partial approval required additional amendments to satisfy the terms of the mandate and that such amendments were to be filed at the end of 1978 for inclusion in the 1979-80 scholastic year, and to provide for desegregation of all schools and grades insofar as it was reasonably feasible.

6. That the partially approved plan was implemented in September 1978 after denial of a motion for stay by the California Supreme Court and the United States Supreme Court.

7. That no major incidence of violence accompanied the commencement of that desegregation plan in September 1978.

8. That subsequent thereto the board moved for and was given additional time to file its amendments and did file said amendments 12 days after the extended deadline.

9. That the hearing date on the amendments was set for June 4, 1979, but was extended to October 15, 1979, upon respondent's motion.

10. That on August 27, 1979, prior to any enrollment figures for the 1979-80 school year having been obtained and prior to any ethnic and racial survey having been made, the board and Bustop, a party herein, moved the court to (a) abandon all pairs and clusters of schools formed for desegregation purposes whose travel times exceed 60 minutes one way, and (b) abandon all junior high school desegregation configurations. That on September 24, 1979, again prior to the conduct of a racial/ethnic survey, the board adopted a resolution asking permission to abandon all mandatory provisions of its desegregation plan and substitute therefore an all-voluntary plan.

11. That the board again sought a continuance of the trial date to October 22, 1979, which was granted by the court.

12. That on October 17, 1979, the board filed its amendments to the plan of February 1978 which in effect sought to abandon all mandatory features of the plan in effect and substitute an all-voluntary plan.

13. That four weeks later, and four weeks after the commence ment of the hearing, another filing was made by the board explaining and enhancing its prior request to substitute an all-voluntar plan.

14. That on January 31, 1980, the board filed another document further explaining and enhancing its all-voluntary request.

15. That the plan of 1978, which was in operation and still is in operation, included 165 schools and designated 54 schools as magnets.

16. That the provisions of that plan included only grades 4-8 for mandatory assignment. That further expansion into more schools and more grades by mandatory assignment was abandoned by the board by its September 1979 motion.

17. That "white flight" or white withdrawal from the participating schools or the school system in the two years of operation of the 1978 plan totalled 13% above the historically normal demographic change and

was especially heavy in participating schools in the San Fernando Valley.

18. That some white flight was anticipated by the designers of the 1978 plan, but actual flight exceeded such plans and was exacerbated by the failure of the board in implementing the plan to follow its own rules and guidelines in such implementation.

19. That all desegregation planning must take into account the fact that respondent's school district is, in area, the largest public school district in the United States; it encompasses 710 square miles, including the cities of Los Angeles, Cudahy, Gardena, Huntington Park, Lomita, Maywood, Vernon and San Fernando. That the area includes portions of 18 other cities in Los Angeles County and substantial unincorporated territory.

20. That the entire school districts of Dayton, Denver, Pittsburgh, Cleveland, San Francisco and Boston could fit within the respondent's boundaries with space remaining.

21. That the respondent's district extends 58 miles in a northwest-southeast direction and is 30 miles from east to west. That the district is physically bifurcated by the Santa Monica mountain range which separates suburban San Fernando Valley from urban Los Angeles.

22. That seventy percent of the white children who attend school in the district live in the San Fernando Valley.

23. That the dividing mountain range is transversed by three major freeways which freeways are virtually the only routes used by the school district in transporting children from the north end of the district across the mountains to the south or vice versa.

24. That 1966 was the first year that the district made a survey of its racial and ethnic composition, and it showed a total pupil enrollment of 627,219 of whom 56% were white children, 21% were black, 18% Hispanic and 4% Asian.

25. That in 1968 the student census increased to 650,324 of whom 53% were white children. That by 1970 the white population had dropped to 49.9% and by 1977 had fallen further to 34%.

26. That the 1979 racial and ethnic survey showed a total student population of 542,583, of whom 27% were white, 24% black, 42% Hispanic and 6.7% Asian.

27. That the 1979-80 K-3 enrollment was composed of 19.6% white children and 53.6% Hispanic children.

28. That the 1979-80 Kindergarten enrollment was composed of 17% white children.

29. That demographic trends absent white flight are generally forecast to produce in five years a total white enrollment of 15-20% of the student body of the district.

30. That the plan of the respondents depends exclusively upon voluntary transfers of both white and minority children, requested and initiated by the parents of those children. That the respondent does

not expect to desegregate minority schools by this plan, but to provide a desegregated experience for some minority children.

31. That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools. That any success which may have been achieved is within its PWT program, which program is used exclusively by minority children to transfer on a daily basis from their minority schools to white schools, thus resulting in no desegregation of minority schools. That the history of magnet schools has also been one of failure to desegregate minority schools and has shown only limited promise in the creation of new desegregated schools.

32. That the all-voluntary plan proposed by the respondent board holds no promise of meeting the mandate in the desegregaton of minority schools.

33. That computer simulations were produced for 36 different plans and variations and were computed

on a district-wide school-by-school basis to determine the likely consequences of the approaches proposed to desegregate the district. That the results of these are set forth in the preceding opinion and adopted herein as findings of facts.

34. That no plan yet proposed is effective in reaching through reasonable and feasible means most of the minority segregated schools in the Los Angeles Unified School District.

35. That presently within the district there would be 283 minority schools, defined as having a student body 70% or more composed of minority children, if all students who reside within their attendance boundaries were to enroll in their home schools. That the total number of schools within the district which are opened to general attendance is 601. That within the 283 minority schools there would be 213 schools having a total minority census of 90-100%, 43 schools whose total minority count would be 80-89.9% and 27 minority isolated schools whose student body would

include 70-79.9% minority children. That even with the current voluntary and mandatory transfer programs in operation under the 1978 plan, the 1979-80 racial-ethnic survey showed that 234,134 of the district's 542,582 students attend schools where the student body is 90% or more composed of minority children.

36. That district-wide desegregation according to the definitions adopted herein and according to all other definitions proposed by parties or intervenors in this case, whether utilizing the multi-ethnic or combined minority concept, is impossible to achieve by reasonably feasible means because of distances, ratios between white and minority children and propensities to white flight.

37. That smaller areas within the district lend themselves to feasible and reasonable forms of desegregation.

38. That the racial and ethnic composition of the district lends itself to the use of two definitions of

desegregated schools depending upon the number of races/ethnicities in the school under consideration. Where that school, in its original form or as reconstituted by desegregation measures, has only whites and members of a single minority group, a bi-ethnic definition as set forth in the guidelines can be adopted; where such school contains whites and sufficient numbers of more than one minority group, the multi-ethnic definition can be adopted as set forth in the guidelines.

39. That all demographic projections forecast continuing change in racial and ethnic composition throughout the district which precludes stability of most desegregated schools for more than three years. That the steps ordered in the guidelines will exhaust the substantial relief of segregation possible through plans restricted within the boundaries of the Los Angeles Unified School District.

40. That of the 225,000 Hispanic children enrolled in the district, 85,000 are either limited in their

English language use or cannot use the English language (LES/NES).

41. That such children are concentrated in 93 racially isolated Hispanic minority elementary schools.

42. That such isolation is the result of segregation.

43. That such isolation inhibits the learning of the English language and contributes to harms of ethnic and racial segregation.

44. That of the 99,000 students of all ethnic and racial origins who are LES/NES, only 44,000 are afforded bilingual instruction.

45. That the above numbered paragraphs state facts specifically singled out from the narrative opinion which contains other facts which are included therein. That both are statements of facts found to be true by this court.

CONCLUSIONS OF LAW

The court finds that any conclusions of law stated in the preceding narrative statement of facts and law are conclusions of law found by this court.

I. It is the duty of the school board to desegregate its minority segregated schools, not just to provide integrated experiences to minority children.

II. The all-voluntary plan proposed by respondent Board does not meet the 1970 mandate of this court nor its July 5, 1977 minute order issued in aid of the mandate, nor does it comply with the July 28, 1976 judgment of the California Supreme Court in this case because:

A. It is not designed to desegregate any of the minority schools of the Los Angeles Unified School District.

B. It treats minority children with less concern than other children in the district.

C. It relies entirely upon voluntary compliance with the mandate by the children and their parents, which reliance is neither reasonable nor realistic.

D. Its provisions, viewed in light of the board's activities, do not demonstrate the board's commitment, even if given more time, to take additional steps to produce meaningful progress in the desegregation of the district's minority schools and the alleviation of the harms arising from segregation.

III. From March 1977, this court has, in its duty of overseeing the Los Angeles Unified School District's response to the requirement that it desegregate its schools, restrained its activities to either granting or denying approval of the requests made by the respondent board concerning its desegregation activities. This restraint was consistent with what the

court perceives as the law. **Crawford v. Board of Education,** 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); **Swann v. Charlotte Mecklenburg Board of Education,** 402 U.S. 1, 28, L.Ed.2d 554, 91 S.Ct. 1267 (1971).

IV. Such restraint was furthermore compelled by the sense of this court that the desegregation activities of the board involve immense efforts which affect large numbers of people in an important way and should be planned and implemented by the Board of Education which is the elected representative of those people. This political process should be a responsive instrument to produce mandated community change and, if followed in good faith and in pursuance to the mandate, should promise longer-lasting success than the imposition of a plan by a court which seeks a quicker and more efficient plan. **Crawford, supra,** 17 Cal.3d at 306 and **Swann, supra,** at 416.

V. However, the test of the continuation of this restraint is the court's appraisal of the school board's

commitment to the necessity of immediately instituting reasonable and feasible steps to alleviate school segregation and to produce meaningful progress in the elimination of segregated minority schools. **Crawford, supra,** at 307.

VI. Respondent board does not have a course of action which is designed to make meaningful progress in the elimination of harms arising out of minority segegated schools, and has not resolved itself to achieve any such plan in the near future. Because of that this court is left with no alternative but to intervene to protect the constitutional rights of minority children.

VII. When a local school board continues to default in its constitutional task, a court may no longer be justified in relying upon the board to implement programs which hold a reasonable promise for securing the rights of minority children. **Crawford, supra,** at 307.

VIII. To comply with the order of this and the California Supreme Court, the Board should, and will be ordered to, prepare a desegregation plan pursuant to the guidelines set forth above in the narrative statement of facts and conclusions forming the opinion and which are set from (sic) on page 77 to 87 of this document.

IX. Any definition of a desegregated school has practical meaning depending upon the available numbers in each racial and ethnic group, and depending upon the use to which the definition is put.

X. The language handicap suffered by Limited English Speaking (LES) and Non-English Speaking (NES) students, the chronic overcrowding in Hispanic schools, and the segregation of Hispanic children cannot be considered separately. Any acceptable desegregation

plan must address all three in a way that promises a comprehensive solution.

Dated: July 7, 1980.

/ss/EGLY
PAUL EGLY, Judge of the Superior Court

SUPERIOR COURT, ORDER AFTER TRIAL UPON PLAN II AND THE PROPOSED ALL-VOLUNTARY PLAN, DATED JULY 7, 1980

[58 C.T. 17430-17446]

The Judgment and Mandate, previously issued in 1970 by this court to desegregate the Los Angeles Unified School District was affirmed by the California Supreme Court on June 28, 1976. This court previously issued its Minute Order, dated July 5, 1977, rejecting respondents' plan for integration filed on March 18, 1977 (Plan I). Following the submision by respondent of a second plan (Plan II) and, in response to the mandate and to the July 5, 1977 Minute Order, this court entered its Minute Order, dated February 7, 1978 conditionally approving implementation of the board's plan to put it into execution in September, 1978 and requiring the board to make additional effort to add necessary amendments and modifications to its plan, or otherwise demonstrate why they were not required

to meet the mandate to desegregate its minority segregated schools.

Upon trial of Plan II and the necessary modifications and amendments thereto, the board, joined by intervenor Bustop, requested that the court permit the board to abandon all mandatory features of its Plan II and, instead, implement a third plan, which totally relies on voluntary means of compliance (the proposed all-voluntary plan).

The matter of the board's compliance with the mandate through Plan II and modifications thereto and the proposed all-voluntary plan, came on for trial before this court, without a jury, between October 22, 1979 and April 11, 1980, in Department 3 of this court, Hon. Paul Egly, Judge presiding.

Witnesses were sworn and examined and documentary evidence was introduced on behalf of the respective parties. After the evidence was closed, the cause was submitted to the court for decision, and after deliberation thereon, the court rendered its

intended decision on May 19, 1980. At the court's direction, petitioners filed a "Proposed Findings of Fact and Conclusions of Law" and a "Proposed Order After Trial Upon Plan 2 and the Proposed All-Voluntary Plan." On June 19, 1980, the parties filed their objections to the proposed Findings of Fact and Conclusions of Law and their proposed counter-findings of fact and conclusions of law. On June 30, 1980 a hearing was held on the aforedescribed Proposed Findings of Fact and Conclusion of Law; the objections thereto, and the proposed counter-findings of fact and conclusions of law. They were submitted to the court for its decision thereon. The court being advised in the premises, made and filed its Findings of Fact and Conclusions of Law, constituting the decision of the court. Pursuant thereto and in accordance therewith, it is:

ORDERED, ADJUDGED AND DECREED that:

1. The board is now ordered to prepare a plan pursuant to the schedule herein, which will be

instituted in September, 1980 for the school year 1980-81.

2. The board is further instructed that time is important to all the parties, the children and the parents of the district, as well as to this court. For that reason development of this plan shall have first importance in all business coming before the board. The staff of the district shall be instructed by the board that their first priority shall be the development and implementation of a plan consistent with these guidelines.

3. The board is ordered to formulate and implement, subject to the approval and supervision of this court, a plan of desegregation consistent with the guidelines attached hereto and incorporated herein as if fully set forth.

4. The plan shall, insofar as external factors will allow, desegregate as many schools as is possible.

5. To accomplish desegregation within the guidelines, the district shall be divided into eleven

areas as set forth in the map attached hereto, or as adjusted, amended or further set forth by subsequent order of this court upon motion of any of the parties.

6. The board will be allowed to devise individual desegregation plans for each area as long as all are consistent with this order. Community input is encouraged to allow choice of forms of desegregation techniques.

7. The present district-wide magnet programs will be allowed to continue provided they meet these guidelines and are desegregated as defined herein. District-wide magnets which are presently not desegregated shall be terminated forthwith, save for those in areas herein numbered 7, 8, 9, 10 and 11.

8. The PWT program may continue. PWT participation may be offered only after mandatory student assignments have been made, and will be available only to those students who are not mandatorily assigned. No student shall be exempted from mandatory assignment because of his acceptance into

the PWT program. Neither shall any PWT student be counted as a resident for purposes of exempting the receiving school from participation in mandatory desegregation programs. Further, no PWT student shall be permitted to segregate any school that would otherwise be desegregated.

9. The board is directed to prepare an inventory as to each school included in the desegregation process and to make periodic evaluations of the progress or non-progress of the integration process so that the board can make a reasoned judgment, subject to approval by the court, upon the occurrence of those changes in demography, to continue that school in its present configuration or to again reconstitute it.

10. To insure compliance with the guidelines and to report to the court periodically as to whether the guidelines are being complied with, the court appoints Edward Hamilton and Francine Rabinovitz as special monitors, whose duties are set forth in this order.

11. The monitoring committee will continue but will report to the court's special monitors.

12. The court makes no further order with respect to Racially Isolated Minority Schools (RIMS) except as set forth in the guidelines herein and continues such existing orders as are now in effect pending further hearing thereon.

13. The court now adopts the present standards as set forth in Article 2 of Chapter 7 of the Education Code beginning with Section 52160 and continuing through section 52179 with, all the amendments now presently in force, as the standard for alleviation of minority students with a foreign language as their primary language. Any subsequent diluting of those standards which would provide less bilingual instruction in Los Angeles by reason of any act of Legislature shall not diminish this bilingual instruction requirement without further order of the court.

14. The respondent board shall develop its student assignment plans so as to cluster LES/NES students in

the desegregation plan to insure that they are represented in sufficient numbers in the receiving school or in their home school as to require bilingual instruction under **Chacon.** Respondent shall make provisions so that LES/NES students are not assigned in individual classes primarily with lower achieving non-LES/NES students.

15. The respondent shall semi-annually collect and publish a comprehensive collection of data on LES/NES bilingual teachers by grade level, pairs and clusters, areas and language so that pupils and teachers can be properly identified and placed.

16. The respondent board shall, considering but not limiting itself to the remedies suggested by petitioners, formulate and adopt further remedies to enhance and accelerate the process of identification, training, remuneration and assignment of bilingual instructional personnel and it shall meet and confer and negotiate upon such remedies, as appropriate under the collective bargaining agreement, with

intervenor United Teachers of Los Angeles (UTLA). Failing agreement, the court reserves jurisdiction to make such other and further orders as are necessary to alleviate the described harms to NES/LES students within the District.

17. The board shall, in formulating all plans under this order, address the language needs of LES/NES students, chronic overcrowding in Hispanic schools, and the segregation of Hispanic children as an indivisible set of problems, and shall propose plans which promise a comprehensive solution to all three.

18. The board shall make provision so that in the schools which participate in desegregation the individual classes therein are not permitted to be segregated.

DATED: _____, 1980

PAUL EGLY
Judge of the Superior Court

GUIDELINES FOR THE FORMATION OF AREA DESEGREGATION PLANS

* * *

[The portions of the Superior Court's Opinion set forth at pages 433-451 of this Joint Appendix are restated here.]

* * *

Dated: July 7, 1980.

/ss/EGLY
PAUL EGLY,
Judge of the
Superior Court

COURT OF APPEAL, ORDER ON PETITION FOR WRIT OF SUPERSEDEAS ON PETITION FOR WRIT OF MANDATE, DATED AUGUST 6, 1980

THE COURT:*

In the Los Angeles Board of Education desegregation cause, **Crawford v. Board of Education** (1976) 17 Cal.3d 280, the California Supreme Court in 1976 affirmed the trial court judgment finding both de jure and de facto segregation in the schools operated by the Los Angeles Board of Education, reversed the trial court's order defining a desegregated school in terms of specific racial and ethnic percentages of white and non-white pupils, and remanded the cause to the trial court for preparation and implementation of "a reasonably feasible desegregation plan . . . to alleviate segregation." (pp. 285-86.) The court noted that the Constitution does not require a school board to achieve

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*Before Roth, P.J., Fleming, J., and Compton, J.

any particular racial or ethnic balance or even an approximate racial or ethnic balance, but merely requires reasonably feasible steps to alleviate school segregation. The court pointed out a number of the tools which are available to the trial court to accomplish this. One of these is busing (pupil reassignment and pupil transportation).

On remand post-judgment hearings were held in the trial court, and the latter adopted and put into effect in 1978 a plan which included mandatory reassignment of pupils attending grades 4 through 8 in every school whose white enrollment exceeded 70 percent. Thereafter on 7 July 1980 the trial court issued a further order which is the subject of the petition for writ of supersedeas. That order established 11 subareas within the Los Angeles Board of Education district and directed that schools be desegregated this fall to the fullest extent possible within each subarea for grades 1 to 9, with grades 10, 11, and 12 to be desegregated one-a-year thereafter.

The court's order declared that a desegregated school is one possessing a plurality of white pupils not in excess of 5 percent over the largest of any of the minority groups. Groups are classified as white, black, Asian, and Hispanic. (The court also declared that a desegrated school with only two racial groups could run from 40 to 60 percent white, but since we are informed by the Board of Education no such schools exist, that part of the order is without practical effect.) The Board of Education seeks a writ of supersedeas to stay enforcement of this order pending appeal.

I.

PETITION FOR WRIT OF SUPERSEDEAS

Certain factual anomalies arise as a result of the length of time this cause has been pending. When the cause was first brought in 1963, the composition of the district was over 60 percent white. The cause was tried and an order entered in 1970 based on 1968

statistics showing a pupil composition of 54 percent white. The 1970 order required desegregation between majority whites and minorities. Meanwhile, however, the white component in the school system declined, and in 1979 the white component within the school district had fallen to 27 percent and the white component of the kindergarten class to 17 percent. Projections at the hearing indicate that the school district in 1987 will be 14 percent white. Of the 11 areas created by the court, areas 1, 2, and 3 possess white majorities of 59 percent, 60 percent, and 53 percent, respectively. Areas 4, 5, 6, and 7, located in the central, western, and southern parts of the school district, are racially mixed among the four groups, none of which has a majority of pupils from any group. Area 8 has a black majority of 64 percent, area 9 is almost equally Hispanic and black (49 percent and 46 percent, respectively), and areas 10 and 11 have Hispanic majorities of 87 percent and 76 percent.

The trial court's order purports to require allocation within areas of pupils among schools on the basis of four racial groups in order to achieve the goal that no school will have a white plurality in excess of 5 percent over the next largest group.

The Board of Education seeks to stay the trial court's order by writ of supersedeas pending appeal, claiming (1) the order is automatically stayed by Code of Civil Procedure section 916 on the filing of an appeal by the Board, and the trial court is without authority under Code of Civil Procedure section 1110(b) to put its order into immediate effect; (2) the Board has been given insufficient time to translate the superior court's order into a workable desegregation plan for this fall; and (3) the court's rigid and fixed definition of a desegregated school is contrary to the mandate handed down by the Supreme Court in its 1976 opinion and will require busing to and from schools which are already desegregated under any reasonable definition of desegregation.

1. We do not believe Code of Civil Procedure section 916 has any great relevancy to a cause such as this, where final judgment has already been entered and which has been remanded to the trial court merely for preparation and implementation of a post-judgment plan to put into effect a decision already arrived at by the Supreme Court. Under such circumstances we do not believe section 916 necessarily controls. Code of Civil Procedure section 1110(b), relied on by the court as authority for the trial court's order, while somewhat contrived in its application, sufficiently serves as a basis for putting the trial court's order into immediate effect.

2. Nor are we impressed by the Board's argument that there is insufficient time to put the court's order into effect. This cause has been pending for 17 years, four of them on remand in the trial court. The elements which constitute the cause are, and have been, familiar to all concerned for many years. Were

we to accept the argument that changing circumstances make it difficult to implement a pupil assignment and pupil transfer order in a rapidly evolving area such as Los Angeles, it would never be feasible and practicable to put such an order into effect.

3. We think, however, the Board's claim that the trial court's order is contrary to the Supreme Court's mandate in **Crawford** has merit. The trial court's order and guidelines purport to require and put into effect a rigid definition of segregation which appears contrary to the admonition and remarks made by the California Supreme Court in reversing the rigid definition of segregation which had been adopted by the trial court in its original order in 1970. Under the not-in-excess-of-5 percent white plurality definition of

the trial court [1] extensive pupil reassignment and pupil transportation will be required in schools which are already desegregated under any reasonable standard and the same will be required in 32 magnet schools presently in operation which are also desegregated under any reasonable standard. (Petitioner has listed

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[1] "I GROUP CLASSIFICATIONS

"The classifications for desegregation shall be based on identification of the predominant ethnic and racial character of each student and shall be limited to one of four groups: (1) Hispanic; (2) white; (3) black; and (4) other minorities, of whom Asians/Pacific Islanders constitute a large majority, but in which group other minorities are included.

"II DEFINITION OF A DESEGREGATED SCHOOL

"The court adopts as a working definition of a desegregated school containing only two racial/ethnic groups, one with a simple majority of white students, plus or minus 10%. In those areas where there are sufficient numbers of minority groups and the practicalities of the situation make it reasonable and feasible, the court adopts a definition of a multiethnic desegregated school which would require a plurality of white children, plus or minus 5%, over the largest of any of the minority groups present. The white complement in a desegregated school may not exceed 10% more than a majority in a biethnic school or 5% more than a plurality in a multiethnic school."

these schools at pages 32, 35, 36, and 37 of its petition for supersedeas.) It appears to us the trial judge has fallen into the same error made by the earlier trial judge in this cause and the same error made by the identical trial judge at bench in **NAACP v. San Bernardino Unified School District** (1976) 17 Cal.3d 311, 314, 325-327, where the California Supreme Court also reversed the trial court for establishing set racial or ethnic percentages for a plan of desegregation.

It also appears to us that, in addition to the error of set, fixed percentage standards for desegregation, the trial court exceeded its mandate by seeking to bring about integration among the four groups in terms of specific racial and ethnic percentages, a proposal, which if perfected, would require massive amounts of additional pupil reassignment and pupil transportation to achieve racial balance among four groups in each school. Such an objective is unwarranted by the mandate of **Crawford**, which spoke in terms of alleviating desegregation between whites and all

minority groups and rejected any constitutional requirement for "racial or ethnic balance." (p. 303.) The underlying constitutional basis which compels removal of legal school segregation is grounded upon past discrimination practiced by whites against minority groups. Nothing in **Crawford**, or any other case of which we are aware, suggests that any past segregation has existed by reason of legal discrimination by one minority group against another minority group. Hence the discrimination which is the subject of constitutional legal redress is that of whites against minorities. We conclude that the constitutional requirement for elimination of segregation by reason of past discrimination is to be evaluated in terms of whites and all minorities considered as a group. **Crawford v. Board of Education** (1976) 17 Cal.3d 280, 287, 302, 303, 304; **NAACP v. San Bernardino Unified School District** (1976) 17 Cal.3d 311, 314, 326, 327.) In this respect the trial court's order may have exceeded its authority under **Crawford**, and we conclude that

that part of its order requiring fixed ratios and quotas of pupils allocated among four racial groups should be stayed.

Having said this, we add that we think the trial court's division of the Los Angeles School District into 11 subareas is a positive step in the creation of a workable and practical plan for alleviation of existing segregation to the extent feasible within the Los Angeles School District pursuant to the mandate of the California Supreme Court in **Crawford.** To the extent it cuts geography down to size, it reduces involuntary busing. The subarea plan has the further advantage of keeping young pupils in their own home areas and permitting them to continue their education in locations with which they have some identification and familiarity. We therefore decline to stay other parts of the trial court's order.

II.

PETITION FOR WRIT OF MANDATE

The Board also attacks the order of the trial court denying the Board's petition to annul all pupil reassignment and mandatory transportation within the Los Angeles School District on the ground that the recent amendment to article 1, section 7(a) of the California Constitution removes authority from the California courts to order such transportation in connection with a plan of desegregation. The constitutional amendment, however, specifically states that it does not apply to pupil assignment or pupil transportation ordered by the courts to remedy violations of the 14th Amendment to the United States Constitution. [2]

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[2] **§7. DUE PROCESS AND EQUAL PROTECTION; PUPIL SCHOOL ASSIGNMENT OR TRANSPORTATION; PRIVILEGES AND IMMUNITIES**

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing (continued)

Plaintiffs attack article 1, section 7(a) on the

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contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under such federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979—80 Regular Session, all courts, wherein such actions or (continued)

ground that it is unconstitutional under the federal constitution as an attempt to reimpose segregation and on the further ground that in any event the article does not apply to **Crawford** in that this cause involves de jure segregation, which is clearly a violation of the 14th Amendment redressable by the courts through use of pupil assignment and pupil transportation. (**Columbus Board of Education v. Penick** (1979) 443

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proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunites and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

U.S. 449; **Dayton Board of Education v. Brinkman** (1979) 443 U.S. 526.) Plaintiffs also cite the original findings, conclusions, and judgment of the trial court in this cause adjudicating de jure segregation, and they point to the statement in the California Supreme Court's opinion on appeal declaring that "[t]he findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature." (**Crawford**, p. 235.)

The opinion of the California Supreme Court in this cause is somewhat ambiguous, in that its main element consists of elimination of racial isolation in California schools regardless of the cause and regardless of de jure or de facto segregation, and the consequent duty imposed by the court on California school boards under the California Constitution to accomplish this goal. On an application for peremptory writ we think we are governed by two principles: (1) A provision of the California Constitution is presumptively constitutional until declared otherwise

in a plenary proceeding before a California appellate court, the California Supreme Court, or the United States Supreme Court. (2) Such being the case, the critical determination here is whether the **Crawford** decision involves de jure rather than de facto segregation. Since the California Supreme Court's opinion said it did involve de jure segregation we will assume it did until we are told otherwise, or until we have examined the issue in a plenary hearing. On the basis of this assumption mandatory pupil assignment and mandatory pupil transportation are available at bench as a remedy for unconstitutional racial segregation. We think any general overturning of existing busing orders, if such is required by the constitutional amendment of article 1, section 7(a), should await an authoritative determination on the merits. We, therefore, deny the petition for writ of mandate, but by separate order we accelerate the appeal or appeals presently filed in this cause from the order of 7 July 1980.

III.

SUPERSEDEAS-STAY ORDER

Pending further order of this court, Item 3 of the trial court's order of 7 July 1980 is stayed to the extent it incorporates those parts of guidelines I and II which define a multi-ethnic desegregated school as one requiring a plurality of white pupils not in excess of 5 percent over the next largest ethnic group in the school. The trial court's order and guidelines are stayed to the extent they define desegregation of schools in terms of percentages and quotas and to the extent they require anything more in a particular school than substantial desegregation (in general, rough equality between majority and minority groups to the extent reasonably feasible) between the white component in the school and all minority groups considered as a whole within the school. The order and guidelines are further stayed to the extent they require pupil reassignment or pupil transportation to or

from a presently substantially desegregated school. In other respects the petition for writ of supersedeas-stay is denied.

IV.

DISPOSITION

The petition for writ of mandate is denied.

Let a writ of supersedeas issue in accordance with this order.

SUPERIOR COURT, ORDER REQUESTING IMPLEMENTATION OF DESEGREGATION PLAN IN AID OF WRIT OF MANDATE PREVIOUSLY ISSUED WITH EXHIBITS A AND B, DATED AUGUST 25, 1980 (EXHIBITS OMITTED)

Pending possible further order of the Supreme Court of California, this order is issued to give both the Respondent Board and the children of this District an opportunity to adequately prepare for the commencement of the school year on September 16, 1980.

Any further delay by this court to await the California Supreme Court's order would not be in the interests of the residents of this District.

Reference is made to this file and its numerous prior orders directed to the Respondent ordering it to prepare adequate plans for the desegregation of the Los Angeles Unified School District. Specific reference is made to this court's order of July 7, 1980 in which the Board was ordered to prepare a plan in

conformity with directions contained therein; and further to this court's order of August 8, 1980 containing an invitation to the Respondent to submit alternate plans consistent with the District Court of Appeal order dated Auqust 6, 1980. Respondent having not furnished a plan and having indicated that it could not do so unless given more time, this court as an alternative, prepared a tentative plan which would allow the Los Angeles Unified School District to be prepared for the commencement of school on September 16, 1980. That tentative plan was circulated to the parties, including the Respondent. After receiving the comments of the parties, and comments from the community, and having had no other plan submitted by respondent or other parties, and after due consideration and in light of the imminence of the commencement of the 1980-81 school year:

IT IS ORDERED THAT THE RESPONDENT BOARD SHALL:

1. Implement forthwith the order of July 7, 1980; the memorandum order of the Court of Appeal, Second District, dated August 6, 1980; this court's order in aid thereof, dated Auqust 8, 1980 and the contents of Exhibit A attached hereto. Such implementation shall commence forthwith so as to be in place and capable of operation by September 16, 1980 and shall remain implemented until further order of this court.

2. To issue forthwith all necessary orders, directions and commands to all persons under the supervision, control and direction of itself, including employees, to carry out the terms of this order.

3. To take no action, either collectively or through the agency of any single member

Thereof, to hinder, delay, or obstruct this order for the purpose of thwarting it.

4. To issue forthwith such necessary commands, orders and directions to all persons under its control, direction and supervision, including employees, to take no action as employees or agents of the Board which actions are designed to hinder, delay or obstruct the implementation of this order.

This order is issued with the knowledge that this court is uncertain of the contents of any order to be made by the Supreme Court of the State of California. This court requested on August 18, 1980, the Respondent Board to participate in contingency planning in the event that the Supreme Court changed the definition of desegregation adopted by the Appeal Court. On August 20, 1980, the Board through its attorneys notified this Court of its unwillingness to do so. Therefore, this Court is faced again with an unsought planning task, and now orders the Board to

give such necessary instructions to its staff to require it to cooperate with the representatives of this Court in the preparation of such contingency plans.

The Sheriff of this county is ordered to serve a certified copy of this order upon the Clerk of the Respondent Board, and the counsel for Respondent is ordered to make known the contents herein to each individual member of Respondent Board.

DATED: August 25, 1980

/ss/Egly
Judge of the Superior Court

Attached: Exhibits "A" and "B" (omitted here).

COURT OF APPEAL, ORDER, DATED SEPTEMBER 4, 1980

THE COURT:*

This court issued its order on August 6, 1980, which, among other matters, stayed pending appeal the trial court's order and guidelines of July 7, 1980, "to the extent they require pupil reassignment or pupil transportation to or from a presently, substantially desegregated school." Thereafter the Supreme Court on August 27 denied a hearing on petitions to vacate this court's stay order. Meanwhile, the trial court issued an order on August 25, which, among other items, required mandatory pupil reassignment and pupil transportation to and from 20 schools which are now, and have been, substantially desegregated by voluntary means, principally issuance of voluntary permits with transportation (PWT).

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* Roth, P.J.; Fleming, J.; Compton, J.

On August 28 the Board of Education, and on September 2 Better Education for Students Today (BEST), petitioned this court, among other items, to secure compliance with our stay order of August 6, 1980 by specifically staying compulsory pupil reassignment and compulsory pupil transportation in schools that had already become substantially desegregated by voluntary means.

In this court's view, the fact that a school has been desegregated by voluntary means and through use of tools other than compelled pupil reasssignment and compelled pupil transportation does not detract from the validity or reality of a school's desegregation. Indeed, it would seem axiomatic that in dealing with such an explosive and emotional issue as forced busing, use of voluntary means of compliance to achieve desegregation is infinitely preferable to use of involuntary means, and that a desegrated school is a desegrated school whether desegregation has resulted from changing residential patterns, from voluntary

means, or from involuntary means. Such is our reading of **Crawford v. Board of Education** (1976) 17 Cal.3d 280, which points to the variety of tools available to achieve desegregation. (pp. 303-305.)

This court's order of August 6, 1980, is specifically supplemented to stay required pupil reassignment or required pupil transportation to or from the following presently substantially desegregated schools:

	School	Total Enroll-Ment	Per-cent White	Percent Minority
1.	Calahan Elem.	388	61.8	38.1
2.	Garden Grove Elem.	166	61.4	38.6
3.	Tulsa Elem.	675	60.1	39.8
4.	Limerick Elem.	925	59.3	40.6
5.	Gledhill Elem.	571	59.0	40.9
6.	Oso Elem.	178	58.4	41.6
7.	Bellagio Elem.	475	58.1	41.8
8.	Rio Vista Elem.	433	57.9	42.0
9.	Rhoda Elem.	425	56.4	43.5

	School	Total Enroll-Ment	Per-cent White	Percent Minority
10.	Oakdale Elem.	419	55.6	44.3
11.	Hesby Elem.	198	55.5	44.4
12.	Colfax Elem.	319	54.8	45.1
13.	Bertrand Elem.	385	53.5	46.4
14.	Anatola Elem.	326	48.7	51.2
15.	Northridge JHS	1,431	58.4	41.5
16.	Emerson JHS	1,512	57.9	42.0
17.	Portola JHS	798	57.6	42.3
18.	Revere JHS	2,035	57.3	42.6
19.	Mulholland JHS	898	53.4	46.5
20.	Madison JHS	1,984	50.0	50.0

For reasons not apparent to us the trial court's order of August 25 directed the school board "[t]o take no action, either collectively or through the agency of any single member thereof, to hinder, delay, or obstruct this order for the purpose of thwarting it." If

the foregoing language simply requires the school board and its employees to comply with the law and not engage in obstruction of justice, the language is redundant. It is to be presumed the school board will not engage in illegal or contumacious conduct. If, on the other hand, the language has as its purpose curtailment of public statements by members of the school board and its employees which are critical of the trial court's rulings, it is overbroad. The court has no authority to prohibit expressions of views on public matters or expressions of dissatisfaction or disagreement by members of the school board and its employees with the rulings of the trial court, this court, or any other court. (**Wood v. Georgia** (1961) 370 U.S. 375.)

Subject to the requirements of constitutional and statutory law the school board has a responsibility to administer the schools under its jurisdiction and to employ its resources to achieve quality education for all pupils. (Ed. Code, § 35010.) As long as the school

board appears to be attempting to meet its responsibilities to the best of its ability, unnecessary intervention by the courts is to be avoided. At bench, the school board contends that the broad mandate given by the trial court to .ts special monitors is unwarranted interference with the board's freedom of action and constitutes an unlawful delegation of judicial authority to the monitors.

The trial court empowered the monitors to do the following:

> "(a)(i) Observe on behalf of the court all planning, budgeting, administrative, and other activities undertaken in preparation and implemation of the new plan.
>
> "(ii) Provide, subject to the parties' access to the court, immediate interpretations of this order where they may be necessary for planning and implementation purposes.
>
> "(iii) Require and set time limits for receipt from the board and/or district staff of any data, special analyses, internal reports and memoranda, or other information necessary, in their judgment, to effective performance of the responsibilities given them in this order. This includes the authority to convene meetings of named district staff personnel.

"(iv) Receive, comment upon, and transmit to the court all progress reports, applications for change, and other communications from board to court concerning desegregation issues.

"(v) Assess and make recommendations to the court concerning the merits of all proposed plans, implementation schedules, financial allocations, and other steps suggested by the board to carry out this order. The special monitors are authorized to immediately and ex parte recommend to the court delay of any board or staff action and insist that it be submitted to the court for review if in their judgment the action would result in noncompliance, undercompliance, or other impairment of the effects of these guidelines.

"(vi) Prepare independent reports and proposals to the court.

"(b) The Board is directed to include the special monitors in all activities significant to preparation and execution of the desegregation plan. A showing that the special monitors have not been consulted to the degree they think necessary in order to offer sensible advice to the court will be sufficient ground for the denial of any proposed change or other action requested by the board." (Italics added.)

Subdivision (b) of the order is especially onerous in that it gives the monitors power to veto any proposal

by the board when they feel that they have not been adequately consulted. Likewise subdivision (a)(iii), which authorizes the monitors to require and set time limits for the board to provide them with information and which authorizes the monitors to issue orders to school board personnel, is an unwarranted invasion of the board's prerogatives and an unlawful delegation of judicial authority. Those parts of the order which go further than empowering the monitors to observe the board's activities and make reports and recommendations to the trial court are in excess of the court's authority, and are hereby stayed.

In all other respects the petitions for extraordinary relief are denied.

SUPERIOR COURT, ORDER, DATED SEPTEMBER 12, 1980, SUPPLEMENTING PRIOR ORDER OF SCHOOL AND PUPIL ASSIGNMENT, DATED AUGUST 25, 1980, AS MODIFIED BY THE COURT OF APPEAL ORDER DATED SEPTEMBER 4, 1980

Following this court's oral request on September 5th and 8th that the respondent Board develop and communicate to the court reasonably feasible plans for desegregating the 14 racially isolated minority schools left segregated as a result of the Order of the Court of Appeal, the respondent Board has filed several declarations and requests that it be relieved of this responsibility for the various reasons given in those filings. The court is sympathetic with the amount of work and the number of readjustments which must be made by the respondent in response to each new court decision, whether by this court or by an Appellate Court, which may change plans and dispositions made and relied upon by the parties. While this is probably inevitable in any complex legal action, the results are

uncomfortable. This court is especially sympathetic to the beneficiaries of the Board's trust, the children of all races and ethnicities, who are probably as confused and bewildered by the accounts of these legal actions as are their parents and communities.

However, the fact remains that unless some action is taken by the Board or this court to maintain efforts to desegregate those 14 minority schools, some 12,895 minority children in minority segregated schools will again be denied their constitutional right to attend a desgregated school. This court feels it necessary to remind the respondent Board that the basic purpose of this case is to enforce that constitutional right.

The respondent Board, having indicated that it cannot make provision this year for those children, has again and without sufficient reason defaulted in its duty toward those children. The court is again left with the task.

This latest delay fits into a consistent pattern of Board behavior which attempts to evade the

responsibility established by the mandate of this court and the Supreme Court and explains much about why this case has been in litigation for 17 years, and in the remedial phase for four years. Despite repeated and emphatic statements by this court and the Court of Appeal that the desegregation measures ordered on July 7 and August 25, other than those stayed by the Court of Appeal, must be carried out by September 16, the respondent Board has spent the entire period since September 4, the date of the Supplemental Order of the Court of Appeal, explaining why it does not have the time to make the adjustments requested by this court.

The intervention of this court meets the test set forth by the California Supreme Court as stated in **Crawford v. Board of Education** [17 C. 3d 280 at 307]. That test authorizes such intervention where a court finds that a local school board has not moved immediately to implement reasonable and feasible steps to alleviate school segregation. In this

circumstance, said the Supreme Court, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children."

Yet, even though the problem of shortness of time is in large part the result of the Board's behavior, it is now real with respect to the revisions in the August 25 school groupings necessary to accommodate the changes made by the Court of Appeal. The court's duty extends to the protection of all the children in those groupings from administrative problems that may attend an attempt to plan the pupil exchange arrangements necessary to operate the revised groupings ordered herein before September 16. Accordingly, for the 45 schools involved in the 12 maintained and revised clusters discussed below and only for those schools and clusters the following procedures shall be permitted:

1. Whenever feasible, each grouping shall begin full operations on September 16. This should be particularly feasible

where no schools have been added to a grouping and schools have already worked together to evolve new pupil exchange arrangements.

2. Where such immediate operation is not feasible, the respondent Board may, at its discretion invite students to report to their neighborhood schools on September 16, pending reassignment, or delay the opening of these schools for a period consistent with the terms of this Order, or adopt other procedures to assure proper treatment of students during any time that may elapse before their permanent assignment within the school groupings.

3. The respondent Board is directed to transmit to this court at or before 10:00 a.m. on September 17 proposals for pupil exchange within the revised

groupings that are consistent with those established for all other mandatory groupings in the District.

4. After approval or amendment of these proposals by this court, the appropriate plans for transportation, teacher assignment, and other necessary admisistrative activities shall be immediately commenced and completed in sufficient time for the reassignment of all students in these revised groupings into the attendance patterns required by the approved pupil exchange arrangements no later then Monday, September 29.

5. Beginning no later than Monday, September 29, all students in these clusters will attend the schools provided for in the revised groupings

and the pupil exchange arrangements through which they are implemented.

This court is also mindful of the need to safeguard the interests of the minority students who will be transported to schools outside their neighborhoods either to relieve overcrowding in their home schools or in response to their applications for Permits With Transportation (PWT). This concern is reflected in the actions ordered below. All of the cluster revisions and pupil assignments so ordered have been designed to assure: (a) full accommodation of students from overcrowded schools listed in the respondents Board's submission of September 11; (b) no displacement of returning PWT students from any school not included in mandatory grouping; (c) no reduction in the total number of PWT openings in the directly or indirectly affected schools; (d) substitute placement of all new and returning PWT students previously scheduled to attend the schools newly added to groupings into PWT assignments in similar schools.

THEREFORE IT IS ORDERED that the Order of this Court of August 25, as amended by the Court of Appeal on September 4, is further amended so that the following school clusters shall be maintained, revised, or supplemented as set forth below so as to afford 12,895 minority children their constitutional rights as required by law.

AMENDED SCHOOL GROUPINGS

Court Area I

The September 4 Court of Appeal Order exempting one school from each of the three-school clusters intended by the August 25 Order of this court to desegregate Dyer and Gridley elementary schools does not substantially impair the desegregation capacity of the remaining schools in each cluster. Thus, no further change will be made in their makeup, and they will operate as two pairs.

The September 4 Court of Appeal Order exempting Tulsa and Gledhill elementary schools from the five

school cluster in which they were placed by the August 25 Order also does not substantially impair the desegregation capacity of the remaining schools in that cluster. Thus no further addition will be made to their makeup, and they will operate as a triad.

1. Cluster desegregating San Fernando Junior High School.

This cluster is designed to desegregate a racially isolated minority school (San Fernando) which had a 1979-80 resident area population of 1,725 students, of whom 1,464 (85%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court, are the following:

— Removal of one 1,214 pupil school (Northridge) containing a 1979-80 resident area population made up of 70% white students and 30% minority students.

— Reduction in the total share of white students in the cluster from 52% to 46%.

Desegregation of San Fernando Junior High School will be accomplished to the maximum degree reasonably feasible by adding Frost Junior High School to the cluster. The effect will be to:

— Add a 1,112 pupil school containing a 1979-80 resident area population made up of 76% white students and 24% minority students.

— Raise the total share of white students in the cluster from 46% to 54%.

One hundred twenty-five of the 246 minority students previously scheduled to be transported to Frost through the Permits with Transportation (PWT) program will be enrolled in Henry Junior High School, which will be desegregated by their arrival together with PWT students already scheduled to enroll there. The remaining 121 PWT students originally scheduled for Frost will be enrolled in Porter Junior High School, which will then be desegregated in the same way.

None of the PWT students previously scheduled to be enrolled in Henry and Porter will be displaced by these additional assignments.

Court Area 2

The September 4 Court of Appeal Order exempting one school from the four school cluster intended by the August 25 Order of this court to desegregate Filmore elementary school does not substantially impair the desegregation capacity of the remaining schools in that cluster. Thus no further change will be made in its makeup, and it will operate as a triad.

1. Cluster desegregating Haddon elementary school.

This cluster is designed to desegregate a racially isolated minority school (Haddon) which had a 1979-80 resident area population of 1,183 students of whom 1,130 (96%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court are the following:

— Removal of two schools (Oakdale and Oso) containing a 1979-80 combined resident area population of 535, of whom 65% were white and 35% minority students.

— Reduction in the total share of white students in the cluster from 46% to 41%.

The desegregation of Haddon will be achieved to the maximum extent reasonably feasible by adding to the cluster Hamlin and Haynes schools. The effect will be to:

— Add two schools containing a combined resident population of 485, of whom 82% are white and 18% are minority students.

— Raise the total share of white students in the cluster from 41% to 48%.

Planning has been proceeding on the basis that 137 minority students would be sent through PWT to Hamlin, and 133 to Haynes. Instead, 82 of these students will be assigned to Oso School, 100 to Tulsa Street and 88 to Limerick. The desegregated

racial/ethnic balance of these schools will not be disturbed by addition of these students, nor will there be any displacement of returning PWT students who attended them in 1979-80.

2. Cluster desegregating Pacoima elementary school.

This cluster is designed to desegregate a racially isolated minority school (Pacoima) which had a 1979-80 resident area population of 1,469 students, of whom 1,454 (99%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operations made pursuant to the August 25 Order of this court are the following:

— Removal of two schools (Anatola and Garden Grove) containing a combined 1979-80 resident area population of 399, of whom 67% are white and 33% are minority students.

— Reduction in the total share of white students in the cluster from 41% to 38%.

Desegregation of Pacoima elementary school will be accomplished to the maximum degree reasonably feasible by adding Wilbur school to the cluster. The effect will be to:

— Add a school containing a 1979-80 resident area population of 324, of whom 88% are white and 12% are minority students.

— Raise the total share of white students in the cluster from 38% to 43%.

Planning has been proceeding on the basis that 236 minority students would be satellite zoned from Union school in Court Area 10 to Wilbur in order to relieve overcrowding at Union school. Instead, 125 Union students will be satellite zoned to Colfax school; 75 Union students will be satellite zoned to Rio Vista; and 36 will be so zoned to Rhoda school. This can be accomplished without any displacement of returning PWT students who attended these schools in 1979-80.

3. Cluster desegregating Telfair elementary school.

This cluster is designed to desegregate a racially isolated minority school (Telfair) which had a 1979-80 resident area population of 1,265 students, of whom 1,218 (96%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court are the following:

- Removal of two schools (Bertrand and Hesby) containing a 1979-80 combined resident area population of 543 (62% white students and 38% minority students).
- Reduction in the total share of white students in the cluster from 40% to 33%.

The desegregation of Telfair will be achieved to the maximum extent reasonably feasible by adding to the cluster Collier and Calabash schools. The effect will be to:

— Add two schools containing a combined resident area population of 418, of whom 82% are white students and 18% are minority students.

— Raise the total share of white students in the cluster from 33% to 41%.

Planning has been proceeding on the basis that 140 minority students would be satellite zoned from Union school (in Court Area 10) to Collier in order to relieve overcrowding at Union. Instead, 71 Union students will be satellite zoned to Anatola school and 69 Union students will be satellite zoned to Garden Grove. The 87 minority students previously scheduled to be transported to Calabash in the PWT program will be assigned to Gledhill elementary school, which can accept them without disturbing its roughly equivalent racial/ethnic balance and without displacing returning PWT students who attended Gledhill in 1979-80.

4. Cluster desegregating Pacoima Junior High School.

This cluster is designed to desegregate a racially isolated minority junior high school (Pacoima) which had a 1979-80 resident area population of 1,646 students, of whom 1,285 (78%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court are the following:

- Removal of two schools (Portola J.H.S. and Mulholland J.H.S.) containing a 1979-80 combined resident area population of 1,422 of whom 77% are white students and 23% are minority students.
- Reduction in the total share of white students in the cluster from 47% to 22%.

The desegregation of Pacoima Junior High School will be achieved to the maximum extent reasonably

feasible by adding to the cluster Parkman and Hale Junior High schools. The effect will be to:

- Add two schools containing a combined resident area population of 1,576, of whom 84% are white and 16% minority students.
- Raise the total share of white students in the cluster from 22% to 52%.

Planning has been proceeding on the basis that 1,000 minority PWT students would be sent to Parkman J.H.S. and Hale J.H.S. Instead, 352 PWT students will be assigned to Portola J.H.S., 302 PWT students will be assigned to Mulholland J.H.S. and 346 to Madison Junior High School. This can be accomplished while maintaining a roughly equivalent racial/ethnic balance at these schools, and without displacing any returning PWT students who attended these schools in 1979-80.

5. Cluster desegregating Maclay Junior High School.

This cluster is designed to desegregate a racially isolated minority school (Maclay Junior High School) which had a 1979-80 resident area population of 1,308 students, of whom 1,160 (84%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court are the following:

- Removal of one school (Madison J.H.S.) containing a 1979-80 combined resident area population of 1,434, of whom 69% were white students and 31% were minority students.
- Reduction in the total share of white students in the cluster from 55% to 47%.

The desegregation of Maclay will be achieved to the maximum extent reasonably feasible by adding to the cluster Hughes Junior High School. The effect will be to:

- Add a school containing a resident area population of 1,126 students, of whom 88% are white and 12% are minority students.
- Raise the total share of white students in the cluster from 47% to 58%.

Planning has been proceeding on the basis that 807 minority students would be sent through PWT to Hughes. Instead, 300 of these PWT students will be assigned to Byrd Junior High school, 158 to Webster J.H.S., 157 to Palms J.H.S., and 192 to Revere J.H.S. The desegregation racial/ethnic balance of these students will not be disturbed by addition of these students, nor will there be any displacement of returning PWT students who attended them in 1979-80.

Court Area 3

1. Cluster desegregating Victory elementary school.

This cluster is designed to desegregate a racially isolated minority school (Victory) which had 1979-80 resident area population of 876 students, of whom 624 (71%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court, are the following:

- Removal of a school (Colfax) containing a 1979-80 combined resident area population of 377, of whom 81% were white students and 19% were minority students.
- Reduction in the total share of white students in the cluster from 49% to 39%.

The desegregation of Victory will be achieved to the maximum extent reasonably feasible by adding to the cluster Lankershim and Carpenter schools. The effect will be to:

— Add two schools containing a combined resident area population of 726, of whom 57% are white students and 43% are minority students.

— Raise the total share of white students in the cluster from 39% to 46%.

2. Cluster desegregating Lankershim elementary school.

This cluster is designed to desegregate a racially isolated minority school (Lankershim) which had a 1979-80 resident area population of 389 students, of whom 269 (69%) were minority. The effects of the September 4 Supplemental Order of the Court of Appeal upon the plan for cluster operation made pursuant to the August 25 Order of this court are the following:

— Removal of one school (Rio Vista) containing a 1979-80 combined resident area population of 374, (68% white students and 32% minority students).

— Reduction in the total share of white students in the cluster from 60% to 57%.

As noted above, the combining of the remaining two schools with Burbank and Victory makes it possible to desegregate both Victory and Lankershim schools.

Court Area 5

The September 4 Supplemental Order of the Court of Appeal removed the two predominantly white junior high schools from the three-school cluster intended to desegregate Pasteur Junior High School. This cannot be remedied by combination of Pasteur with any other school in Court Area 5, making it impossible to desegregate any minority junior high school in that Area.

The only remediable change made by the September 4 Order of the Court of Appeal in this Court Area affects the cluster designed to desegregate Hillcrest elementary school. This school had a 1979-80 resident area population of 1,027 students, of whom, 1,023 (99%) were minority. This court's Order

concerning Magnet schools, dated August 20, 1980, created a Center for Enriched Studies on the Hillcrest campus and directed that 300 minority students from the Hillcrest resident area be satellite zoned to naturally desegregated schools which could accept them without becoming segregated.

The change in the cluster effected by the Court of Appeal is to remove Bellagio school from the triad, leaving Westwood paired with Hillcrest. This pair can desegregate Hillcrest if the regular Hillcrest enrollment is further reduced through satellite zoning. Accordingly:

- 47 Hillcrest resident area students will be satellite zoned to Bellagio.
- 130 other Hillcrest resident area students will be satellite zoned to other desegregated schools in Court Area 5 that can accept them without becoming segregated thereby.
- The Hillcrest Center for Enriched Studies will be increased in size by 150 pupils, 75 of

whom will be selected from the Hillcrest resident enrollment.

Other Court Areas

The September 4 Supplemental Order of the Court of Appeal requires no changes in the groupings established in Court Areas 4 and 6 by the August 25 Order of this court.

Pupil Exchange Arrangements

The pupil exchange arrangements for all school groupings included within the Order of this court of August 25 have been prepared by District Area Integration Teams, Area Superintendents, and central integration staff in close consultation with the court's Special Monitors. The District has a demonstrated capacity to fashion such arrangements with efficiency, sensitivity, and dispatch. In the light of this capacity, the respondent Board is ordered to direct its staff immediately to prepare proposed pupil exchange arrangements for each of the revised clusters listed

above, and to submit them to his court as required herein.

DATED: September 12, 1980

/ss/EGLY
Judge

COURT OF APPEAL, ORDER, DATED OCTOBER 2, 1980

THE COURT:

One or more appeals have been taken from the orders of the trial court in this cause involving mandatory pupil reassignment and pupil transportation. On August 6, 1980, we issued an order shortening time for the various steps in the appeal. Thereafter, on August 27, 1980, the Supreme Court recommended that this court further accelerate the progress of appeal. We are advised by the Superior Court of Los Angeles County that the clerk's transcript in this cause will be completed on or before Wednesday, October 15, 1980, but that it cannot tell us when a reporter's transcript will be filed.

Pursuant to our authority under Rules 12, 45, 52, and 53 of the California Rules of Court, we hereby order as follows:

Preparation of formal reporter's transcripts of the various oral proceedings in the trial court is dispensed with.

The following briefing and argument schedule will be observed: Appellant or appellants will file opening briefs on or before Wednesday, November 5, 1980; respondent or respondents will file reply briefs on or before Wednesday, November 26, 1980. Rebuttal briefs will be filed on or before Wednesday, December 3, 1980. The cause is ordered on calendar for oral argument on Monday, December 8, 1980, at 10 a.m. in our courtroom located on the second floor, 3580 Wilshire Blvd., Los Angeles.

Parties relying on oral proceedings in the trial court will set out the verbatim testimony of a witness or witnesses, or the text of the oral proceeding relied upon, in appendices to their respective briefs filed with this court. Such appendices will also include, to the extent practicable, copies of such exhibits as may be necessary, and pertinent extracts of exhibits and

testimony in the original proceedings in 1970. Parties will be guided in the preparation of appendices, to the extent practicable, by rule 30, Federal Rules of Appellate Procedure.

Appellant Board shall personally serve respondents, the trial judge, and the county clerk with copies of this order and file an affidavit of service with the clerk of this court on or before October 6, 1980. All briefs and appendices shall be personally served upon the parties, and affidavits of service thereof shall be filed with the clerk of this court.

COURT OF APPEAL, ORDER, DATED OCTOBER 8, 1980

Appellant's motion to bifurcate its appeals is granted. The appeal from the trial court's order of May 19, 1980 will be governed by our expediting order of October 2, 1980.

The appeals from the trial court's order of July 7, 1980 will be governed by our expediting order of August 6, 1980, except that a reporter's transcript is dispensed with in accordance with the provisions of our order of October 2, 1980.

COURT OF APPEAL, OPINION, DATED DECEMBER 19, 1980

[This is set out as Appendix A to the Petition for Writ of Certiorari, pp. 1A-71A.]

LOS ANGELES UNIFIED SCHOOL DISTRICT

RACIAL AND ETHNIC ENROLLMENTS

GRADES K-12

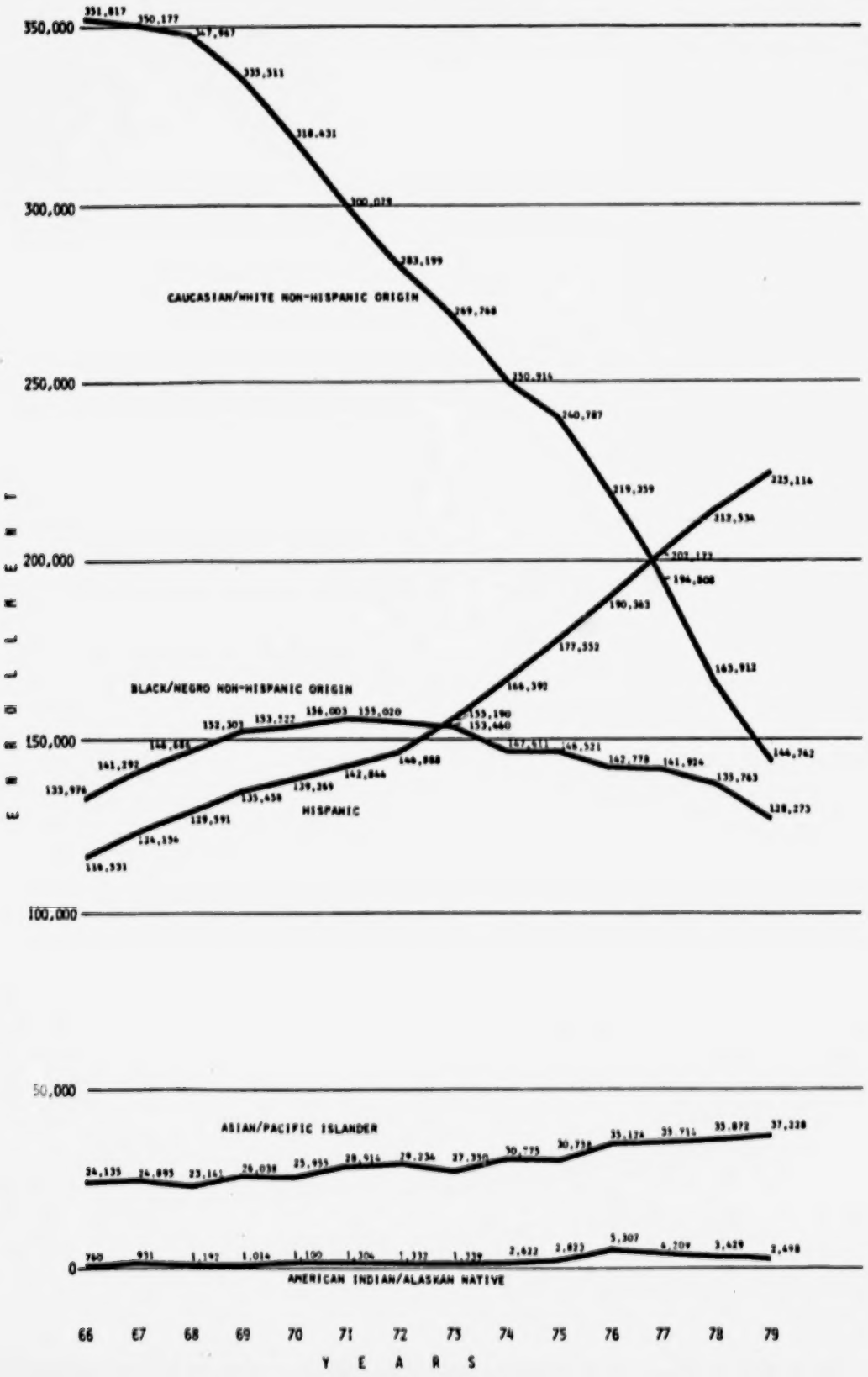

Exhibit II-1.

[1 R.T. 19]

COMPARE 1979 ACTUAL ETHNIC ENROLLMT AND 1980 ACTUAL AS OF 10/10/80 DATE 101080 PAGE 639

1979 ACTUAL ENROLLMENT

	GRADE	TOTAL	OW	%OW	CM	%CM	BL	%BL	HIS	%H	AF	%AF	AI	%AI
DISTRICT TOTAL	K	40392	7242	17.9	33150	82.1	7221	17.9	23342	57.8	2530	6.3	57	.1
DISTRICT TOTAL	01	41896	7043	16.7	34048	81.3	7640	18.7	23400	55.9	2715	6.5	93	.2
DISTRICT TOTAL	02	40813	8230	20.2	32583	79.8	8262	20.2	21338	52.3	2839	7.0	114	.3
DISTRICT TOTAL	03	42369	9275	21.9	33094	78.1	9174	21.7	20736	48.9	3011	7.1	171	.4
DISTRICT TOTAL	04	42904	10147	23.7	32757	76.3	9997	23.3	19561	45.6	3015	7.0	164	.4
DISTRICT TOTAL	05	41813	10258	24.5	31555	75.5	10092	24.1	18160	43.4	3074	7.4	229	.5
DISTRICT TOTAL	06	39382	10160	25.8	29162	74.2	9770	24.9	16353	41.6	2802	7.1	229	.6
DISTRICT TOTAL	07	40066	10881	27.2	29185	72.8	10563	26.4	15729	39.3	2637	6.6	256	.6
DISTRICT TOTAL	08	40614	11419	28.1	29195	71.9	11015	27.1	15171	37.4	2710	6.7	299	.7
DISTRICT TOTAL	09	41071	13201	31.5	28070	68.5	11042	26.4	14439	34.5	2849	6.8	341	.8
DISTRICT TOTAL	10	46523	15724	33.8	30799	66.2	11844	25.5	15532	33.4	3217	6.9	366	.8
DISTRICT TOTAL	11	41025	15376	37.5	25649	62.5	10815	26.4	11741	28.6	2931	7.1	162	.4
DISTRICT TOTAL	12	33684	13848	40.9	20036	59.1	9260	27.4	7856	23.2	2761	8.1	151	.4
DISTRICT TOTAL	U	4363	1133	26.0	3230	74.0	1362	31.2	1734	39.7	103	2.5	26	.6
DISTRICT TOTAL	K-3	165470	32595	19.7	132875	80.3	32497	19.6	88018	53.7	11125	6.7	435	.3
DISTRICT TOTAL	1-3	125078	25353	20.3	99725	79.7	25276	20.2	65476	52.3	8595	6.9	378	.3
DISTRICT TOTAL	4-6	124039	30565	24.6	93474	75.4	29667	24.1	54094	43.6	8891	7.2	692	.5
DISTRICT TOTAL	1-6	249117	55918	22.4	193199	77.6	55143	22.1	119570	48.0	17486	7.0	1000	.4
DISTRICT TOTAL	K-6	289509	63160	21.8	226349	78.2	62364	21.5	142912	49.4	20016	6.9	1057	.4
DISTRICT TOTAL	7-9	122551	35501	29.0	87050	71.0	32620	26.6	45339	37.0	8195	6.7	696	.7
DISTRICT TOTAL	10-12	121432	44948	37.0	76484	63.0	31927	26.3	35129	28.9	8909	7.3	519	.4
DISTRICT TOTAL	1-9	371668	91419	24.6	280249	75.4	87763	23.6	164909	44.4	25681	6.9	1896	.5
DISTRICT TOTAL	TOT	537055	144742	26.9	393113	73.1	120273	22.8	228114	41.9	37228	6.9	2491	.5

1979

1980 ACTUAL ENROLLMENT

	GRADE	TOTAL	OW	%OW	CM	%CM	BL	%BL	HIS	%H	AF	%AF	AI	%AI
DISTRICT TOTAL	K	41039	6393	15.6	34646	84.4	7180	17.5	24915	60.7	2444	6.0	107	.3
DISTRICT TOTAL	01	42003	6334	15.1	35669	84.9	8015	19.1	24892	59.2	2686	6.4	86	.2
DISTRICT TOTAL	02	40970	6605	16.1	33893	83.9	7901	19.6	22955	56.9	2919	7.2	118	.3
DISTRICT TOTAL	03	39039	7006	17.8	32333	82.2	8124	20.7	21178	53.8	2926	7.4	107	.3
DISTRICT TOTAL	04	40978	7929	19.3	33049	80.7	9016	22.0	20863	50.9	2956	7.2	204	.5
DISTRICT TOTAL	05	41749	9059	21.7	32690	78.3	9784	23.4	19630	47.0	3090	7.4	170	.4
DISTRICT TOTAL	06	41018	9477	23.1	31541	76.9	10031	24.5	18279	44.6	3020	7.4	211	.5
DISTRICT TOTAL	07	38957	9823	25.2	29134	74.8	9850	25.3	16241	41.7	2787	7.2	246	.6
DISTRICT TOTAL	08	39324	10254	26.1	29070	73.9	10153	25.8	15044	40.3	2818	7.2	255	.6
DISTRICT TOTAL	09	40194	10929	27.2	29265	72.8	10608	26.4	15351	38.2	2969	7.4	337	.8
DISTRICT TOTAL	10	46221	13867	30.0	32354	70.0	11086	24.0	17317	37.5	3767	8.1	184	.4
DISTRICT TOTAL	11	42213	14475	34.3	27738	65.7	11427	27.1	12940	30.7	3210	7.6	151	.4
DISTRICT TOTAL	12	31320	12354	39.4	10966	60.6	8330	26.6	7760	24.8	2704	8.6	164	.5
DISTRICT TOTAL	U	4720	1269	26.9	3451	73.1	1605	34.0	1690	35.8	139	2.9	17	.4
DISTRICT TOTAL	K-3	162759	26218	16.1	136541	83.9	31220	19.2	93930	57.7	10975	6.7	416	.3
DISTRICT TOTAL	1-3	121720	19025	16.3	101895	83.7	24040	19.8	69015	56.7	8531	7.0	307	.3
DISTRICT TOTAL	4-6	123745	26465	21.4	97280	78.6	28831	23.3	58780	47.5	9076	7.3	581	.5
DISTRICT TOTAL	1-6	245465	46290	18.9	199175	81.1	52871	21.5	127795	52.1	17607	7.2	903	.4
DISTRICT TOTAL	K-6	286504	52683	18.4	233821	81.6	60051	21.0	152710	53.3	20051	7.0	1093	.4
DISTRICT TOTAL	7-9	118475	31006	26.2	87469	73.8	30619	25.8	47436	40.0	8574	7.2	840	.7
DISTRICT TOTAL	10-12	119754	40696	34.0	79058	66.0	30843	25.8	38025	31.8	9661	8.1	509	.4
DISTRICT TOTAL	1-9	363940	77296	21.2	286644	78.8	83490	22.9	175231	48.1	26181	7.2	1743	.5
DISTRICT TOTAL	TOT	529453	125654	23.7	403798	76.3	123110	23.3	239661	45.3	30145	7.3	2075	.4

1980 RACIAL + ETHNIC DATA

Exhibit II-2

EXHIBIT II-521, RESOLUTION BY BOARD OF EDUCATION FROM MINUTES OF JUNE 18, 1979
[57 R.T. 8515]

MINUTES, REGULAR MEETING
BOARD OF EDUCATION,
CITY OF LOS ANGELES
JUNE 18, 1979
3:20 p.m.

* * *

The President called upon Mrs. Fiedler to present her noticed resolution, postponed from the Regular Meeting, June 11, 1979.

Mrs. Fiedler moved the adoption of the following resolution:

WHEREAS the Board of Education of the Los Angeles Unified School District feels that integration of its schools is a proper goal; and

WHEREAS such integration should take place in a setting chosen by each student and his/her parents; and

WHEREAS the federal courts of the United States have clearly stated that segregation resulting from neighborhood housing patterns is not the responsibility of school boards to correct; and

WHEREAS the federal courts have stated clearly that only intentional acts of boards of education and their incremental effects must be remedied; and

WHEREAS the state courts of California have taken a wholly different view of this matter requiring desegregation regardless of the cause of segregation; and

WHEREAS Senate Constitutional Amendment 2 will require the courts of California to comply with the rulings of the federal courts in the area of desegregation; and

WHEREAS Senate Constitutional Amendment 2 has been duly passed by the California legislature and is awaiting passage by the voters; and

WHEREAS Senate Bill 217 would bring about a special election on November 6, 1979: Now, therefore, be it

RESOLVED, That the Board of Education of the Los Angeles Unified School District hereby requests the Legislature of California to ratify Senate Bill 217 at the earliest moment to allow the electorate to vote on this extremely important issue; and be it

FURTHER RESOLVED, That the Board of Education of the Los Angeles Unified School District endorses Senate Constitutional Amendment 2; and be it

FURTHER RESOLVED, That the Superintendent be instructed to arrange a meeting between those members of this Board

favoring this resolution and the Governor to urge his signing of S.B. 217 when it reaches his desk.

Said motion was seconded by Dr. Ferraro.

Mrs. Fiedler noted that today the legislature passed S.B. 217 and it will be going to the Governor for signature.

During the discussion that followed, Dr. Nava requested, and was granted, a separation of the two resolutions contained in the motion, for voting purposes.

President Bardos requested that the resolution be amended by deleting the second and third "WHEREAS" paragraphs; and that the first "RESOLVED" be amended to reflect the State Legislature's present status on the matter. The amendments were accepted by the maker and the seconder of the motion.

Roll call on that portion of the motion to adopt the first "RESOLVED" resulted in the following vote:

Ayes: Dr. Ferraro, Mrs. Fiedler, Dr. Nava, Mrs. Weintraub, President Bardos 5

Noes: Father Bohler 1

The President declared the first "RESOLVED" carried.

Roll call on that portion of the motion to adopt the second "RESOLVED" resulted in the following vote:

Ayes: Dr. Ferraro, Mrs. Fiedler, Mrs. Weintraub, President Bardos 4

Noes: Father Bohler 1

Abstained from voting: Dr. Nava 1

The President declared the second "RESOLVED" carried and the resolution, as amended, adopted in its entirety.

The wording of the motion, as amended and adopted, is as follows:

WHEREAS the Board of Eduction of the Los Angeles Unifed School District feels that

integration of its schools is a proper goal; and

WHEREAS the federal courts have stated clearly that only intentional acts of boards of education and their incremental effects must be remedied; and

WHEREAS the state courts of California have taken a wholly different view of this matter requiring desegregation regardless of the cause of segregation; and

WHEREAS Senate Constitutional Amendment 2 will require the courts of California to comply with the rulings of the federal courts in the area of desegregation; and

WHEREAS Senate Constitutional Amendment 2 has been duly passed by the California legislature and is awaiting passage by the voters; and

WHEREAS Senate Bill 217 would bring about a special election on November 6, 1979:

Now, therefore be it

RESOLVED, That the Board of Education of the Los Angeles Unified School District hereby supports the Legislature of the State of California in its passage of Senate Bill 217 which will allow the electorate to vote on this extremely important issue; and be it

FURTHER RESOLVED, That the Board of Education of the Los Angeles Unified School District endorses Senate Constitutional Amendment 2; and be it

FURTHER RESOLVED, That the Superintendent be instructed to arrange a meeting between those members of this Board favoring this resolution and the Governor to urge his signing of S.B. 217 when it reaches his desk.

Office-Supreme Court, U.S.
FILED
SEP 10
ALEXANDER L. STEVAS,
CLERK

No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Although petitioners have framed three separate questions, the case really presents only one:

> Does the Fourteenth Amendment invalidate a state constitutional amendment which prohibits a state court from imposing mandatory student assignment and transportation as a desegregation remedy unless that remedy is required by the Federal Constitution?

The decision below by the California Court of Appeal decided two questions: (1) that the state constitutional amendment in question (known as "Proposition 1") is constitutional, and (2) that the trial court's desegregation plan violated Proposition 1 because the record did not contain any evidence of intentional, *de jure* segregation of students.

Petitioners have not challenged the Court of Appeal's second holding. It is therefore undisputed that the record contains no evidence of intentional, *de jure* segregation of students that would constitute a violation of the Fourteenth Amendment.

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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Board of Education of the City of Los Angeles, governing body of the Los Angeles Unified School District ("the District") opposes the petition for certiorari, as follows:

STATEMENT OF THE CASE

I.

PROCEEDINGS IN THE TRIAL COURT.

This case was filed on August 12, 1963, several weeks after the California Supreme Court stated in dictum in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 881-82, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that article I, section 7(a) of the California Constitution required school districts to remedy *de facto* segregation in their schools.

On May 12, 1970, the trial court entered a judgment and writ of mandate which required the District to prepare a

plan for the desegregation of its schools. (Clerk's Transcript ["C.T."] at 615.) Following an appeal by the District, the California Supreme Court affirmed with modification and remanded with instructions to take "reasonably feasible steps to alleviate segregation and its accompanying harm." *Crawford v. Board of Education of the City of Los Angeles*, 17 Cal.3d 280, 286, 551 P.2d 28, 130 Cal.Rptr. 724 (1976). The court stated in dictum that the trial court's findings adequately supported the conclusion that segregation in the District was *de jure* in nature, but it expressly did not rest its decision on that characterization. 17 Cal.3d at 285. Instead, the court reaffirmed its dictum in *Jackson* and held that there was "an obligation under the State Constitution" to undertake reasonably feasible steps to alleviate school segregation "whether the segregation be de facto or de jure in origin." 17 Cal.3d at 290 and 301. Because the California Supreme Court's decision was based upon its construction of the California Constitution, the District did not seek review before this Court.

Following remand, the trial court commenced renewed proceedings in February 1977. On March 18, 1977, the District submitted its first desegregation plan, which included mandatory reassignment of students on a limited basis. After a three month trial, the trial court on July 5, 1977, rejected the plan and ordered the District to return a new plan within 90 days, after examining "all reasonable alternatives."

The District did not appeal the trial court's rejection of its first plan, but instead returned a new plan ("Plan 2") on October 3, 1977, within the 90-day period specified by the court. Following hearings, the trial court approved implementation of Plan 2 beginning in September 1978, describing the plan as "an important initial step toward eventual compliance with the writ of mandate." (C.T. at 6828.)

During the summer of 1978, intervenor Bustop moved to stay implementation of Plan 2, contending that the plan violated the constitutional rights of schoolchildren. The trial court denied the motion, but the Court of Appeal granted a stay incident to Bustop's appeal. The California Supreme Court vacated the stay and Justices Rehnquist and Powell each refused to intervene pending review by this Court. *Bustop, Inc. v. Board of Education of the City of Los Angeles*, 439 U.S. 1380, 1384 (1978).

Plan 2 commenced operation on September 12, 1978. By providing for mandatory reassignment of approximately 40,000 students attending grades 4 through 8 of every school with a white enrollment over 70% (except one, which is geographically isolated), it was one of the nation's most extensive plans of mandatory student reassignment. (*See generally*, C.T. at 2730-5314.) Plan 2 also provided for voluntary desegregation through the magnet school and permits with transportation programs.

In March 1979 the District filed a comprehensive analysis of the first semester performance of Plan 2. Because of the plan's failure to desegregate, due in large part to unprecedented losses of white students, the District recommended no further additions to the mandatory reassignment component and instead proposed expansion of the voluntary programs.

By Fall 1979, all parties wanted Plan 2 discontinued. On October 22, 1979, the trial court commenced renewed hearings to consider alternatives to Plan 2. The District proposed an all-voluntary desegregation plan which would have expanded the existing magnet program and permits with transportation program to include a combined total of 50,000 students, developed 16 educational complexes containing 189 schools and 154,000 students, and expanded special programs for predominantly minority schools. Petitioners

and most other parties presented their own desegregation approaches.

On November 6, 1979, fifteen days after the trial began, the people of California, by more than a two-to-one margin, approved Proposition 1. It became effective the day following its enactment. *See* Cal. Const., art. IV § 24(a).

Proposition 1 amended article I, section 7(a) of the California Constitution to prohibit state courts from ordering mandatory student assignment or transportation unless necessary to remedy a specific violation of the Fourteenth Amendment. On November 15, 1979, the District applied, pursuant to article I, section 7(a), to modify the trial court's minute orders concerning Plan 2 and to "hold a hearing to determine whether a federal court, sitting today, would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation." (C.T. at 13315.) Although the parties filed extensive briefs on Proposition 1, the trial court deferred ruling on the District's application until the completion of the pending trial.

The trial ended on April 11, 1980, after 25 weeks of testimony, 12,000 pages of transcript, and 450 exhibits. On May 19, 1980, the trial court entered a minute order denying the District's application under article I, section 7(a) of the California Constitution. (C.T. at 16850.) On July 7, 1980, the trial court signed without alteration an eight-page set of findings of fact and conclusions of law petitioners had proposed for the May 19 minute order. (C.T. at 17448.) Neither the trial court's minute order nor the findings of fact ruled upon the constitutionality of Proposition 1. Instead the court held that the trial record from 1970 established *de jure* segregation in violation of the Fourteenth Amendment and that the constitutional question was therefore moot. (*Id.*)

On July 7, 1980, the trial court also entered an order, findings of fact and conclusions of law, which rejected the District's voluntary desegregation plan and ordered a new plan (termed "Plan 3") based on extensive mandatory reassignment of students. On July 10, 1980, the trial court, notwithstanding the District's appeal, ordered immediate implementation of Plan 3 pursuant to California Code of Civil Procedure § 1110b.

Although both the California Court of Appeal and the California Supreme Court declined to vacate the trial court's July 7 order by extraordinary writ of mandamus, the trial court's order was modified by two stay orders issued by the Court of Appeal during the summer of 1980. The principal effect of the stay orders was to require the trial court to exclude naturally desegregated schools from mandatory reassignment. On September 12, 1980, Justice Rehnquist denied the District's application to stay the trial court's July 7 order pending review by this Court. *Board of Education of City of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980).

The District commenced the 1980 school year on September 16, 1980, under Plan 3, as modified by the Court of Appeal's stay orders. Plan 3 remained in operation through April 10, 1981.

II.
PROCEEDINGS IN THE COURT OF APPEAL.

On July 10, 1980, the District filed two notices of appeal: the first concerning the trial court's order of May 19, 1980, regarding Proposition 1, and the second concerning the order of July 7, 1980. All other parties, including the petitioners, also appealed from the trial court's July 7 order.

The Court of Appeal expedited briefing, and on October 8, 1980, it bifurcated the appeal from the May 19 order

concerning Proposition 1 and the appeal from the July 7 order. The Court of Appeal heard argument on the Proposition 1 appeal on December 8 and filed its opinion on December 19, 1980.

Unlike the trial court, the Court of Appeal reached the question of the constitutionality of Proposition 1. The court declared Proposition 1 constitutional, and further held that the May 19 and July 7 orders violated Proposition 1 because the record did not contain evidence of intentional, *de jure* segregation. Accordingly, the Court of Appeal vacated the trial court's May 19 and July 7 orders, and remanded the case for further proceedings. On December 23, 1980, the Court of Appeal issued an order dismissing all appeals from the July 7 order as moot.

Following an unsuccessful petition for rehearing in the Court of Appeal, petitioners filed a petition for hearing in the California Supreme Court. That petition was denied on March 11, 1981, at which time the Court of Appeal's decision became final under state law. (*See* Cal. Rules of Ct. 24 and 25.)

III.

RECENT PROCEEDINGS IN THE STATE AND FEDERAL COURTS.

The Court of Appeal's remittitur was filed in the trial court on March 12, 1981. On March 16, 1981, the Board of Education adopted a resolution which ordered Plan 3 to be terminated and which gave parents of mandatorily reassigned students the option of returning their children to neighborhood schools or remaining in mandatory reassignment beginning on April 20, 1981, the first day of the fourth academic quarter. Petitioners filed a motion for preliminary injunction in the trial court, which was denied. The Court

of Appeal and the California Supreme Court each denied review of the trial court's ruling.

After the state courts had declined to enjoin the District's termination of Plan 3, one group of petitioners' attorneys filed a new action in the United States District Court for the Central District of California, entitled *Los Angeles NAACP, et al. v. Los Angeles Unified School District, et al.* (No. CV 81-1811 AWT). On April 17, 1981, the District Court issued a temporary restraining order prohibiting the termination of Plan 3. *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 513 F.Supp. 717 (C.D.Cal. 1981). That order was vacated by the Ninth Circuit Court of Appeals on the following day, April 18. *Los Angeles Unified School Dist. v. District Court*, 650 F.2d 1004 (9th Cir. 1981). On Easter Sunday, April 19, the federal plaintiffs filed an application with Justice Rehnquist, as Circuit Justice, to stay the order of the Court of Appeals. The application was withdrawn on Monday, April 20. (*See* No. A-875.)

On July 16, 1981, after full briefing and oral argument, the District Court denied plaintiffs' motion for preliminary injunction. The District Court also denied the District's motion to dismiss the case on the ground of abstention and *res judicata*, but it recently certified that ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

On April 20, 1981, over 7,000 students (4,300 of whom were minority students) elected to end their participation in mandatory reassignment and return to their neighborhood schools. All students who remained in paired and clustered schools through the end of the 1980-81 school term did so on a voluntary basis.

The District has since developed an expanded voluntary desegregation plan for the 1981-82 school term, which was

submitted to the state trial court for approval. In late July and early August the trial court (Superior Court Judge Robert B. Lopez) held hearings regarding the District's plan and alternatives offered by all parties in the state court proceedings. On August 14, 1981, Judge Lopez concluded all proceedings on the District's voluntary plan (except for attorneys' fees motions by petitioners and intervenors) and now has the District's proposed plan and the parties' alternatives under submission.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEAL WAS CORRECTLY DECIDED AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR LOWER APPELLATE COURTS.

A. Proposition 1 Does Not Prohibit Mandatory Reassignment; It Only Conforms the Availability of That Remedy to the Requirements of the Fourteenth Amendment.

Petitioners have overstated the effect of Proposition 1. They claim that it "destroys" their right to an equal education, that it "forever denies" mandatory reassignment as a desegregation remedy, and that it imposes "enormous litigation burdens" on minority students. (Pet. at 34, 53, and 57.)

Proposition 1 does none of these things. As the Court of Appeal correctly held, it does nothing more than conform the California Constitution to the Federal Constitution in one narrow area: the power of a state court to order mandatory student assignment or transportation as a desegregation remedy. (Opinion, Appendix at 50A-63A.) Proposition 1 provides in relevant part:

> "In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such

party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."

Proposition 1 thus does not "destroy" or "forever deny" court-ordered mandatory assignment or transportation of students. It embraces the requirements of the Fourteenth Amendment and does not reject that decisive standard. The tools of mandatory assignment or transportation may still be ordered so long as a California state court finds a violation of the Fourteenth Amendment. Moreover, Proposition 1 does not create unconstitutional "litigation burdens" for minority plaintiffs any more than the Fourteenth Amendment itself. The standard of proof for establishing a right to mandatory reassignment or transportation is identical to the standard under the Federal Constitution. The error of petitioners' argument is illuminated by one indisputable fact: for years federal courts have ordered mandatory reassignment where that remedy is appropriate. Proposition 1 permits state courts to do the same.

The protection afforded by Proposition 1 is in fact even broader than the Fourteenth Amendment. Since Proposition 1 is concerned only with court-ordered reassignment or transportation of students, remedies which rely on other techniques are not affected. California state courts may still remedy *de facto* segregation by imposing desegregation plans based upon voluntary transfers of students. (*See* Opinion, App. at 55A-56A and 67A.) A federal court has no such power under the Federal Constitution.

Finally, Proposition 1 places no restriction whatsoever on local school boards that wish to adopt plans of mandatory reassignment or transportation. It expressly states that "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan."

B. Proposition 1 Does Not Violate the Fourteenth Amendment; It Specifically Embraces Its Protections and Provisions.

In September 1980, Justice Rehnquist analyzed the constitutionality of Proposition 1 as follows:

> "Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

Board of Education of City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980) (quoting Judge Cohn's order upholding the constitutionality of Proposition 1 in *Tinsley v. Palo Alto Unified School District*, No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980).

This analysis, which was adopted by the Court of Appeal (Opinion, App. at 62A), is based upon firmly established authority. This Court has made it clear that state constitutional provisions will be held to violate the Federal Constitution only when there is a clear conflict between state and federal law. Thus, in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), this Court held:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Accord, Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("[S]tate constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted

constitutional rights could not otherwise be protected and effectuated.").

Similarly, in *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413-14 (1977), this Court held that the repeal or rescission of a state enactment (there, a resolution concerning school desegregation) violates the Federal Constitution only if the enactment itself was required by a preexisting federal constitutional duty. *Accord, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 531 n.5 (1979) ("*Dayton II*"); *Santa Barbara School Dist. v. Superior Court*, 13 Cal.3d 315, 328-30, 530 P.2d 605, 118 Cal.Rptr. 637 (1975).

There is nothing in Proposition 1 which conflicts with the Federal Constitution or circumvents federally protected rights or duties. Rather, Proposition 1 specifically embraces the Federal Constitution by providing for mandatory reassignment or transportation whenever permitted by the Fourteenth Amendment.

Proposition 1 closely parallels federal statutes enacted by Congress pursuant to its power to enforce the Fourteenth Amendment. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, places strict limitations on remedies which may be ordered to correct school segregation that does not violate the Fourteenth Amendment. Federal courts which have reviewed these provisions have concluded that "The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution." *Morgan v. Kerrigan*, 530 F.2d 401, 411 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); *accord, Hart v. Community School Board*, 512 F.2d 37, 52 (2d Cir. 1975). This is the same effect achieved by Proposition 1.

Many of the same arguments which petitioners have made in this case were rejected in *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980), which was brought to attack portions of the 1974 Equal Educational Opportunities Act. The provisions in question prohibited the Department of Health, Education and Welfare from requiring mandatory student reassignment as a condition to receiving federal education funds. The District Court upheld the act's constitutionality because its provisions, like those of Proposition 1, do not totally prohibit mandatory reassignment but simply remove one setting in which it can originate. 455 F.Supp. 837, 841 (D.D.C. 1978).

On appeal, plaintiffs argued that the provisions were unconstitutional because they hampered HEW's efforts to desegregate schools and therefore impermissibly involved the federal government in the preservation of school segregation, and because the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Court of Appeals, in an opinion by Judge Bazelon, rejected both arguments and affirmed the trial court's ruling. The court's discussion applies equally to Proposition 1:

> "[A]ppellants assert that the amendments, by their plain terms, effect and purpose, violate the fifth amendment by eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim: the amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either argument."
>
> 627 F.2d at 1230.

In contrast to Proposition 1, the authorities upon which petitioners rely all involved state statutes and constitutional provisions which conflicted with, rather than embraced, the Fourteenth Amendment. *Reitman v. Mulkey*, 387 U.S. 369 (1967), for example, concerned a constitutional amendment which effectively repealed fair housing statutes and guaranteed that a person could decline to sell, lease or rent real property to anyone he or she desired. Although this Court emphasized that a state does not violate the Federal Constitution by repealing laws concerning racial discrimination, it held, in a 5 to 4 decision, that the California amendment was unconstitutional because the State had affirmatively "authorized and constitutionalized" a private right of racial discrimination which significantly encouraged and involved the State in purposeful and intentional private discrimination. 387 U.S. at 376.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), this Court reiterated that the repeal of an existing state law concerning racial discrimination does not violate the Fourteenth Amendment. 393 U.S. at 390 n.5. However, it held unconstitutional an Akron, Ohio city charter amendment which required all ordinances concerning housing discrimination on the basis of race, religion or national origin to be approved by a majority vote of the city electorate after passage by the city council. All other ordinances did not require such approval and became effective immediately upon passage by the council. This Court held the charter amendment directly violated the Fourteenth Amendment because it "was an explicitly racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389.

Unlike the Akron charter amendment in *Hunter*, Proposition 1 does not create an explicit racial classification. To the extent Proposition 1 creates a classification at all, it does

so among the various desegregation remedies available to California state courts to correct *de facto* segregation. Mandatory student assignment and transportation, a severe remedy which imposes unique burdens, may now be ordered only if the evidence establishes a Fourteenth Amendment violation. *Cf., James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (refusing to extend *Hunter* because the California constitutional provision in question did not create an explicit racial classification).

The Akron amendment in *Hunter* differs from Proposition 1 in another fundamental respect. The Akron amendment imposed burdens without regard to the provisions of the Federal Constitution. In contrast, Proposition 1 incorporates the same rights and duties established by the Fourteenth Amendment.

Petitioners also have cited cases involving state statutes and constitutional provisions concerning mandatory reassignment or transportation of students. Unlike Proposition 1, however, each of those provisions *flatly prohibited* reassignment of students. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43, 44 n.1 (1971) (statute prohibited busing of students under any circumstances); *Seattle School Dist. v. State of Washington*, 633 F.2d 1338, 1341 (9th Cir. 1980) (statute prohibited school boards from voluntarily adopting desegregation plans based on mandatory reassignment); *Lee v. Nyquist*, 318 F.Supp. 710, 712 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) (statute prohibited school boards from mandatorily reassigning students without parental consent); *Santa Barbara School Dist. v. Superior Court*, 13 Cal.3d 315, 323, 118 Cal.Rptr. 637, 530 P.2d 605 (1975) (statute prohibited mandatory reassignment of students based upon race); *San Francisco Unified School Dist. v. Johnson*, 3 Cal.3d 937, 942, 92 Cal.Rptr. 309, 479 P.2d 669 (1971), *cert. denied*, 401 U.S.

1012 (1971) (statute prohibited school boards from mandatorily reassigning students without parental consent); *School Committee v. Board of Education*, 366 Mass. 315, 319 N.E.2d 427, 432 (1974), *cert. denied*, 421 U.S. 947 (1975) (statute prohibited the state board of education from ordering student reassignment).

Unlike the provisions in those cases, Proposition 1 does not prohibit mandatory reassignment or transportation of students. That remedy is still available to California state courts so long as a Fourteenth Amendment violation is established by the evidence and the remedy is permissible under federal law. Moreover, local school districts are free to implement mandatory reassignment under any circumstances.

C. By Conforming the California Constitution to the Federal Constitution, Proposition 1 Does Not Have an Unconstitutional Purpose or Effect.

Although petitioners have relied extensively on this Court's opinion in *Reitman v. Mulkey*, 387 U.S. 369 (1967), they have ignored one of its principal holdings. In *Reitman*, the California Supreme Court examined the "immediate objective," "ultimate effect," and "historical context" of Proposition 14 and concluded that the proposition unconstitutionally involved the state in private racial discrimination concerning housing matters. In affirming, this Court granted extreme deference to the conclusions drawn by the California Supreme Court:

> "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 14], and familiar with the milieu in which that proposition would operate, has determined that the provision would involve the State in private racial discriminations to an

unconstitutional degree. We accept this holding of the California court."

387 U.S. at 378-79; *accord*, 387 U.S. at 373-74 and 381.

Petitioners contend that an examination of the "immediate objective," "ultimate effect," and "historical context" of Proposition 1 demonstrates a similarly unconstitutional purpose and effect. However, the California Court of Appeal, the state court of highest resort in this case, has conducted the same analysis that was made in *Reitman* and has concluded that Proposition 1 does not have a discriminatory purpose or effect. As in *Reitman*, the California court's determination should be afforded great respect.*

Petitioners have argued at length about the California electorate's purpose and intent in enacting Proposition 1. However, as this Court has declared:

"It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."

United States v. O'Brien, 391 U.S. 367, 383 (1968); *accord, Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980).

To the extent the electorate's intent is relevant at all, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979), makes it clear that petitioners have failed to satisfy

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*The California Supreme Court's denial of the petition for hearing in this case should not be regarded as without significance. In *Eisenberg v. Superior Court*, 193 Cal. 575, 578, 226 P. 617 (1924), the California Supreme Court said "The order of this court denying a petition for transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in that opinion." *Accord, DiGenova v. State Board of Education*, 57 Cal.2d 167, 178, 367 P.2d 865, 18 Cal. Rptr. 369 (1962).

their burden of establishing a specific intent to injure minority students. In *Feeney*, this Court examined a Massachusetts statute which gave generous hiring preferences to veterans and which produced an admittedly "severe" impact on the employment opportunities of women. 442 U.S. at 271. The Court upheld the statute despite its foreseeable adverse effect on women, because the plaintiff failed to prove that the veteran's preference "was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." 442 U.S. at 279.

The materials offered by petitioners to "prove" the electorate's intent regarding Proposition 1 are extraordinarily unreliable and inadmissible and are not properly before this Court. The materials consist of newspaper clippings, campaign literature and other unofficial documents. (*See* App. at 94A-104A; C.T. at 14071-200.) They were filed with the trial court and "authenticated" by a declaration from one of petitioners' attorneys, who simply said that he had examined them. Petitioners never asked the trial court to take judicial notice of these materials, and the court never did so on its own motion. The District moved to strike the materials (C.T. at 14375), but the trial court never ruled on the District's motion (C.T. at 16582). The trial court did not make any findings about the purpose or effect of Proposition 1, and it declined entirely to rule on the constitutionality of the proposition. After reviewing these same materials, the Court of Appeal concluded that petitioners' arguments about the electorate's intent were "pure speculation." (Opinion, App. at 64A.)

Under these circumstances, the acceptance of petitioners' arguments about the purpose and effect of Proposition 1

would require this Court to review evidence which is not properly in the record and to make findings of fact which directly contradict the conclusions of the Court of Appeal.

D. Proposition 1 Does Not Retroactively Deprive Petitioners of Any Vested Right.

Petitioners claim that Proposition 1 deprives them of previously adjudicated rights, but they have failed to cite a preexisting judgment or order which entitles them to the remedy of mandatory reassignment. In fact, none exists. Moreover, the California state courts reviewed the arguments petitioners have presented here and concluded that Proposition 1 does not deprive petitioners of any vested rights under the prior orders entered by those same state courts.

In the California Supreme Court's first review of *Crawford* in 1976, no specific remedial desegregation plan was before the court. 17 Cal.3d at 302. In remanding with instructions for the trial court to oversee development and implementation of a plan, the court specifically refrained from holding that mandatory assignment or transportation of students was constitutionally required. 17 Cal.3d at 309-10.

After initial proceedings upon remand, the District itself proposed Plan 2, which relied extensively on mandatory reassignment of students. Petitioners opposed Plan 2, but the trial court approved its implementation beginning in September 1978. Within weeks after the commencement of Plan 2, petitioners joined in a motion to terminate the plan and substitute a new court-designed plan.

By September 1979 all parties, including petitioners, wanted Plan 2 discontinued. The trial court commenced hearings to consider alternatives to Plan 2 on October 22, 1979. Shortly after commencement of those hearings, on

November 15, 1979, the District invoked Proposition 1 in an application filed with the trial court.

Thus, at the time the District invoked Proposition 1 in November 1979, there was no preexisting judgment or order which gave petitioners a "vested right" to mandatory reassignment. Contrary to the impression which they seek to convey, Proposition 1 was enacted and invoked at a time when the trial court was in the early stages of a six month trial to determine the remedy required by the California Constitution.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 81-38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD,
a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether a state constitutional provision which, on its face, imposes unique obstacles to judicial relief from racial segregation in violation of state law, placing no analogous obstacles in the path of judicial relief from other state law violations, may be upheld solely because the provision "embraces the protection of the Fourteenth Amendment."

2. Whether proof of such a provision's racially discriminatory purpose and effect may be disregarded solely because racially neutral purposes recited in the provision itself "could have been" among the motives that led to the provision's adoption.

LIST OF PARTIES

The list of parties was set out in the Petition for Writ of Certiorari on page ii. Per Rule 28.1 of this Court, the list is not repeated here.

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No. 81-38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONERS' BRIEF

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the court below are reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980), see cert. pet. 1A-71A.

Other reported opinions in previous phases of the case are reported at 448

U.S. 1343, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980); 439 U.S. 1380 and 1384, 58 L.Ed.2d 88 and 92, 99 S.Ct. 40 and 44 (1978); 17 Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976); 69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 19, 1980. Petition for rehearing was denied on January 14, 1981.

Petition for hearing in the California Supreme Court was denied on March 11, 1981.

By order dated June 1, 1981, Mr. Justice Rehnquist granted an extension of time to July 9, 1981, within which to petition for certiorari.

The petition was filed on July 8, 1981. It was granted on October 13, 1981.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution which states in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, Section 7(a), as amended by Proposition 1 on November 6, 1979, states:

ARTICLE 1. DECLARATION OF RIGHTS

§7. Due process and equal protection; pupil school assignment and transportation

(a) A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws; [*] provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation. (1) except to remedy a specific violation by such party that of the Equal Protection Clause of the 14th Amendment to the United

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[*] What follows is the amendment, Proposition 1.

States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

STATEMENT OF THE CASE

Proposition 1, enacted by California voters in a special state-wide election on November 6, 1979, amends the state

equal protection clause -- Article I, §7(a) of the California Constitution -- to "limit the power of California courts to require desegregation." [1]

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[1] This quotation is from the "Analysis by Legislative Analyst" contained in the official California Ballot Pamphlet, mailed by state election officials to all Califonia voters prior to the election. After reminding the voters that the California Supreme Court had interpreted the state constitution to grant broader school desegregation remedies than the federal Constitution provides, the analysis explained the effect of Proposition 1:

> Specifically, desegregation could be required only in cases where the U.S. Constitution would require it. As a result, the proposition could affect 13 school districts which now have desegregation plans ordered or approved by a California court plus other school districts that are involved or could become involved in desegregation actions before California courts.
>
> J.A. 260.

At the time Proposition 1 was adopted, [2] respondent Board of Educa-

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[2] Proposition 1 is the most recent in a long series of official acts to create and maintain racial segregation in the California public schools. The state's early history of official school segregation covers nearly a century: from the legislative enactment of school segregation laws shortly after the state's admission into the union in 1850, through its refusal to ratify the Fourteenth Amendment in 1868, and ultimately to the repeal of its segregation laws in 1947. See B. Reams & P. Wilson, eds., Segregation and the Fourteenth Amendment in the States: A Survey of State Segregation Laws 1865-1953; Prepared for United States Supreme Court in re: Brown v. Board of Education of Topeka, 34-53 (1975). Other sources on California's history of official segregation include: I. Hendrick, The Education of Non-Whites in California, 1849- 1970 (1977); C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975 (1976); R. Cloud, Education in California (1952); W. Ferrier, Ninety Years of Education in California -- 1846 to 1936 (1937). In the years after **Brown v. Board of Education**, 347 U.S. 483 (1954), California altered its posture from one of requiring segregation to one of officially barring school desegregation.
(continued)

tion of the City of Los Angeles was

The state's first formal segregation law, enacted in 1863, barred "Negroes" and other minorities from the regular public schools, provided for withdrawal of state funds from non-complying school districts, and allowed the establishment of separate schools for minorities. Other school segregation statutes followed. Statutes of California, 1863, Ch. CLIX, §68, 210. Statutes of California, 1863-1864, Ch. CCIX, §13, 213; Statutes of California, 1865-1866, Ch. CCCXLII, §§57, 58 & 59, at 398; Statutes of California, 1867-1870, Ch. DLVI, §56, at 839. The 1872 Political Code of California provided, in §1662:

> Every school unless otherwise provided by special statute, must be open for the admission of all white children between 5 and 21 years residing in the district.

Section 1669 of that Code declared:

> The education of children of African descent and Indian children must be provided for in separate schools.

Separate but equal education was upheld by the California Supreme Court in **Ward v. Flood**, 48 Cal. 36, 17 Am.Rep. 405 (1874), and further segregation statutes ensued. Later "children of Mongolian or Chinese descent" were relegated to (continued)

under a state trial court order, entered

separate schools, Political Code §1662, as amended; in 1909 Indian and Japanese children were similarly segregated. Education Code §§8803 and 8004. The state segregation laws were not repealed until 1947. Statutes of California, 1947, Ch. 737.

After **Brown** and **Jackson v. Pasadena City School District**, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963) (California Constitution requires local school districts to desegregate regardless of the cause of segregation), California began to adopt laws which barred desegregation.

In response to mandatory school desegregation proposals volunteered in 1969 by the San Francisco Unified School District, the California Legislature in 1970 enacted Education Code §1009.5 which provided that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or the guardian."

The California Supreme Court held that if this language were interpreted to bar transportation and assignment for desegregation, it would be unconstitutional. **San Francisco Unified School District v. Johnson**, 3 Cal.3d 937, 479 P.2d 669, 92 Cal.Rptr. 309 (1971). The court explained that "exorcising a (continued)

in 1970 and affirmed by a unanimous

method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools, necessarily legislates the preservation of racial imbalance. It therefore violates constitutional imperatives." Id. at 943.

In 1972, in response to the California Supreme Court's decision in **Johnson** as well as to the Superior Court's decision in this case requiring desegregation in Los Angeles, State Assemblyman Floyd Wakefield of Los Angeles successfully led an initiative campaign for an anti-desegregation measure known as Proposition 21. Section 1 of Proposition 21, which added §1009.6 to the State Education Code, stated: "no public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." In **Santa Barbara School District v. Superior Court**, 13 Cal.3d 315, 324, 530 P.2d 605, 118 Cal.Rptr. 637 (1975), the state Supreme Court held that §1009.6 was "unconstitutional in the same manner and for the same reasons set forth by us in **Johnson**."

When the state Education Code was re-organized in 1976 (Cal. Stats. 1976, Ch. 1010), §§1009.5 and 1009.6 were re-enacted (as §§35350 and 35351, respectively) despite the Supreme Court's narrow interpretation of §1009.5 and its invalidation of §1009.6. Similar (continued)

California Supreme Court in 1976, to desegregate its separate and inferior minority segregated schools. 3/ In **Crawford v. Board of Education,** 17

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statutes were enacted at that time to cover community colleges in addition to elementary and secondary schools. Education Code §§72209, 72210.

For a summary of California's history of official segregation in matters other than public education, see Cert. Pet. App. G at 94A-104A.

3/ In its 1970 decision the California Superior Court found that the Los Angeles Board of Education had "knowingly, affirmatively, and in bad faith . . . segregated, de jure, its students." **Crawford I,** 17 Cal.3d at 288; J.A. 42. The court also found that "the plant, teachers, physical facilities and curriculum at . . . minority segregated schools are in fact of poorer quality than the plant, teachers, physical facilities and curriculum at its predominantly white schools." J.A. 37. The court ordered the Board to desegregate its schools. J.A. 139.

A brief history of this 18-year litigation to desegregate the Los Angeles public schools is provided in an Appendix to this brief.

Cal.3d 280, 551 P.2d 28, 130 Cal.Rptr. 724 (1976) (**Crawford I**), the Supreme Court reaffirmed its holding in **Jackson v. Pasadena City School District**, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that regardless of the cause of racial segregation in the public schools, that segregation in and of itself violates the California Constitution. The court squarely rejected the federal rule that school desegregation plaintiffs must show official intent to segregate in order to prevail. 17 Cal.3d at 289-302. The Supreme Court made it clear that the Los Angeles Board of Education was required, not merely to open its predominantly white schools to racial and ethnic minorities who attended minority segregated schools, but also to desegregate the minority

segregated schools themselves. Id. at 303. [4]

On remand, the Board first presented a partial, part-time desegregation plan that was rejected by the Superior Court as insufficient. J.A. 147, 327. The Board then proposed a limited plan, Plan II, that was accepted by the Superior Court as a first step toward compliance with the mandate. J.A. 173 [5] The plan, which involved about seven per cent of

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[4] Under **Crawford** I, local school boards in California are required to "take reasonable and feasible steps to eliminate segregated schools, i.e., schools in which the minority student enrollment is so disproprotionate as realistically to isolate minority students from other students . . . ." Id. at 303.

[5] The court held Plan II "patently" insufficient to constitute full compliance with **Crawford** I and ordered the Board to return with appropriate modifications. J.A. 172, 178.

the district's students in its mandatory portions, went into effect in the fall of 1978. Two months later, in November 1978, a panel of experts appointed by the Superior Court recommended inter-district (metropolitan) desegregation as the most feasible means of assuring long-term desegregation of racially segregated minority schools in Los Angeles. 6/

In December 1978, within three months of these two occurrences -- the onset of initial desegregation and the suggestion of an interdistrict plan -- State

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6/ **See** Reports of Dr. Robert Crain, Exh. II - 360 at 62-63; Dr. Reynolds Farley, Exh. II - 354 at viii; Elwood A. Hain, Jr., Esq., Exh. II-358 at 3-4; Dr. Gary Orfield, Exh. II-359 at 4, 15, 44, 65, 82-83, 86-93, 94, 99; Dr. Thomas Pettigrew, Exh. II-553 at 144-45, 149-52, 156, 164-65 (80 R.T. 11624).

Senator Alan Robbins, of the predominantly white San Fernando Valley section of Los Angeles, authored two measures which were adopted by the California Legislature: a proposed constitutional amendment known as Proposition 1 that would prevent state courts from ordering mandatory student assignment unless federal as well as state rights to equal educational opportunity had been violated, and a law requiring a special state-wide election for the purpose of adopting Proposition 1 without delay. J.A. 194, 211, 214, 215, 218.

As described in the official California Ballot Pamphlet, Proposition 1 was designed principally to accomplish two purposes: (1) rescission of existing state court orders to desegregate minority schools which were segregated

in violation of the California Constitution, especially the trial court's 1970 order for mandatory assignment in Los Angeles; and (2) prevention of future such orders based on the state constitution. J.A. 260, 261.

The "Analysis by Legislative Analyst" contained in the ballot pamphlet stated both that the amendment curtails judicial power to order student transportation and assignment to achieve desegregation and that it applies to all state desegregation cases, regardless of whether plaintiffs have already obtained a judgment and a remedial order for mandatory student assignment. 7/

Proposition 1 was Senator Robbins' fourth attempt to place a similar

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7/ See footnote 1, supra, page 1.

initiative before the voters. [8] In the two years preceding it, he had introduced two measures which passed the Senate but expired in the Assembly Judicary Committee, and had led an unsuccessful campaign to secure enough petition signatures to place a constitutional amendment on the state ballot. According to contemporaneous newspaper reports, Proposition 1 gained wider support because a court-ordered desegregation plan had begun in Los Angeles and particularly because the Superior Court's panel of experts had advised the court to consider metropolitan

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[8] First known as State Constitutional Amendment 2, the measure became Proposition 1 on the November 6, 1979 ballot.

relief. 9/ J.A. 196, 200, 201, 203, 204, 208, 213, 236-37.

Following legislative approval of Proposition 1, Senator Robbins introduced Senate Bill 217, authorizing a special state-wide election (at a cost of $12 million) on August 28, 1979, in

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9/ The Senate Education Committee held immediate hearings and, on January 10, 1978, approved Proposition 1 by a 10-1 vote. Sen. Diane Watson, the only black member of the committee and a former member of the Los Angeles school board, dissented. J.A. 199. The amendment passed the Senate and moved to the Assembly Judiciary Committee. On March 14, 1979, the committee approved the amendment. The only dissenting votes were cast by the committee's two black members, Maxine Waters of Los Angeles and Willie L. Brown, Jr. of San Francisco. J.A. 212.

A week later, after a debate marked by expressions of racial antagonism, the amendment passed the full assembly on a 62-17 vote. Dissenting members denounced the measure as an incentive to "racial hostility," J.A. 216, and said it was "racist on its face." J.A. 216-17.

time to prevent Plan II, the on-going court-ordered desegregation program in Los Angeles, from continuing for a second school year if Proposition 1 prevailed. J.A. 213. Although S.B. 217 failed to win Assembly approval in time to permit that election to go forward, the Legislature did approve an amended version of the bill authorizing a special election on November 6, 1979. J.A. 234. [10] On that date [11] Proposi-

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[10] Shortly after enactment of Senate Bill 217, respondent Board of Education expressed its support of the bill, urged the Governor to sign it, and formally endorsed the proposed constitutional amendment:

> RESOLVED, That the Board of Education of the Los Angeles Unified School District hereby supports the Legislature of the State of California in its passage of Senate Bill 217 which will allow the electorate to vote on this extremely important issue; and be it

(continued)

tion 1 was adopted by the voters by a 2-

> FURTHER RESOLVED, That the Board of Education of the Los Angeles Unified School District endorses Senate Constitutional Amendment 2; and be it
>
> FURTHER RESOLVED, That the Superintendent be instructed to arrange a meeting between those members of this Board favoring this resolution and the Governor to urge his signing of S.B. 217 when it reaches his desk.
>
> J.A. 557.

11/ Shortly before the election, proponents of Proposition 1 took the unusual step of seeking clarifications of Proposition 1. See Comment, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause, 10 Golden Gate U.L.Rev. 611, 679 (1980). In response, both the State Attorney General and the Secretary of State issued pulic statements. J.A. 280, 282. The Attorney General explained:

> The persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 and are asking for a "yes" vote.

(continued)

1 margin. 12/

The persons and organizations who favor busing to achieve racial integration in the schools are generally against Proposition 1, and are asking for a "no" vote.

J.A. 280-81.

12/ On July 19, 1979, shortly after this Court's opinions in **Columbus Board of Education v. Penick**, 443 U.S. 449 (July 2, 1979) and **Dayton Board of Education v. Brinkman**, 443 U.S. 526 (July 2, 1979) (**Dayton II**), Sen. Robbins introduced S.B. 1244 in the California Legislature. The bill provided that plaintiffs seeking "pupil school assignment or pupil transportation in order to enforce any provision of the California Constitution" would bear the burden of proof of all facts necessary to obtain that relief throughout the litigation. The bill further described its provisions as "necessary for the immediate preservation of the public peace" because in the event Proposition 1 was adopted "it can reasonably be anticipated that substantial and immediate litigation will result." J.A. 306. The bill was therefore to take effect immediately.

Although the Legislature passed the bill, the Governor vetoed it on the ground that it was unconstitutional. Los Angeles Times, Feb. 5, 1980, §I, at (continued)

One month earlier, the Superior Court had convened hearings on Plan IV, [13] a

3; id., April 11, 1980, §I, at 3.

The immediate sequence of events leading to the adoption of Proposition 1 is set forth in greater detail in J.A. 194-246. See also Comment, supra, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause, 10 Golden Gate U.L. Rev. 611 (1980); Comment, Proposition 1 and Federal Protection of State Constitutional Rights, 75 Nw. U.L. Rev. 685 (1980). Cf. Pollard, How to Win Enemies and Influence People, Cal. J. 301 (Sept. 1979).

[13] In March 1979, in response to the court's order to modify and strengthen Plan II, J.A. 172, 178, the Board had submitted Plan III, a reduced version of Plan II that continued to use mandatory reassignment. Exhs. II-3 through II-8; 3 R.T. 378. In May 1979, the Board president -- a supporter of Plan III -- was recalled. J.A. 255. In an ensuing regular election two other new members were elected to the Board. The new majority sought court approval for proposals to dismantle nearly all the mandatory components of Plan II, withdrew the Board's submission of Plan III, and sought court approval to replace it with an all-voluntary plan (Plan IV). 44 C.T. 13,158.

Board-proposed all-voluntary plan for desegregation of the district. Shortly after passage of Proposition 1, both the Board and private intervenor Bustop, a San Fernando Valley-based organization, requested the court to modify its prior orders to eliminate those portions requiring mandatory reassignment of students for the purpose of desegregation. J.A. 185; Cert. Pet. App. E at 77A. The court deferred ruling on the combined motion until the conclusion of the trial on Plan IV. During the six-month hearings, which ended in April 1980, only petitioners submitted evidence on the issue of whether racial discrimination was a motivating factor in the adoption of Proposition 1.

On May 19, 1980, the trial court denied the Board and Bustop motion,

basing its decision upon the 1970 Superior Court finding, affirmed by the California Supreme Court in 1976, that school segregation in Los Angeles was de jure in nature. Cert. Pet. App. E at 77A-78A. The court declined to rule on the constitutionality of Proposition 1, holding that question "moot" on the ground that the same remedy would be required under both state and federal equal protection clauses. Id. 78A - 80A. The court therefore entered no findings of fact and made no conclusions of law with respect to the motivating factors underlying Proposition 1.

On July 7, 1980, the trial court held that the Board's all-voluntary proposal (Plan IV) failed to meet the state constitutional standard, J.A. 320, and

specifically found mandatory reassignment essential to satisfaction of the mandate. J.A. 459-60. In addition, the court held that a voluntary plan would disproportionately burden racial minorities. J.A. 344. The court issued guidelines, J.A. 433-51, and directed the Board to use those guidelines in developing a desegregation plan involving both mandatory and voluntary components. J.A. 469.

The Board appealed both the May 19 and July 7 orders. J.A. 4. [14/] The Court of Appeal bifurcated the appellate issues, separating Proposition 1 (the May 19 order) from all other matters.

[14/] Petitioners also appealed the July 7 order, J.A. 4, primarily on the ground that the trial court's guidelines precluded desegregation of the district's most racially segregated and isolated minority schools.

J.A. 543. On December 19, 1980, prior to completion of briefing on the non-Proposition 1 issues, the Court of Appeal reaffirmed the Board's duty to desegregate the district's schools under the state constitution and the **Crawford I** mandate regardless of the cause of segregation, held that the trial court's 1970 findings did not support a ruling that intentional segregation had occurred in Los Angeles, upheld the constitutionality of Proposition 1, and vacated the trial court's orders of May 19 and July 7. The Court of Appeal dismissed the remaining issues as moot. **Crawford v. Board of Education,** 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (hereafter cited as **Crawford II**).

The Court of Appeal disposed of petitioners' argument that Proposition 1 constitutes an explicit racial classification in violation of **Hunter v. Erickson**, 393 U.S. 385 (1969), on the sole ground that the amendment "embraces the protection of the Fourteenth Amendment . . . ." **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. The court did not deny that Proposition 1 imposes race-specific burdens. Nor did it address the question whether the Fourteenth Amendment forbids the imposition of those burdens, especially when they prevent racial minorities alone from obtaining remedies necessary to the vindication of state constitutional rights.

Like the trial court, the appellate court made no findings regarding the

intent and effect of Proposition 1. Instead, the Court of Appeal declared that a "sufficient answer" to petitioners' argument that Proposition 1 was passed with discriminatory intent could be found in the proposition itself -- in its recital of racially neutral purposes purportedly underlying the amendment. Id. at 654, 170 Cal.Rptr. at 509. The court further dismissed as "pure speculation" any contention that the amendment was motivated in any part by racial discrimination, stating its "belie[f]" that the proposition "could have been motivated without segregative intent and discriminatory purpose by the considerations" listed in Justice Powell's dissent in **Estes v. Metropolitan Branches, Dallas NAACP**, 444 U.S. 437, 450-51 (1980). **Crawford II**, 113

Cal.App.3d at 655, 170 Cal.Rptr. at 509.

Petition for rehearing was denied on January 14, 1981. Cert. Pet. App. B at 72A. The California Supreme Court denied petitioners' petition for a hearing on March 11, 1981. J.A. 4. This Court granted petitioners' petition for writ of certiorari on October 13, 1981, 50 U.S.L.W. 3278.

SUMMARY OF ARGUMENT

This case is only superficially concerned with the mandatory transportation of students. By amending its constitution so as to withhold the full panoply of otherwise available state court remedies from those -- and only those -- who challenge racial separation

in violation of the state's own laws, the State of California has created not a dual school system (although such a system might be the result) but a dual court system: a first-class judicial system for whites and for problems unrelated to race, and a second-class judicial system, its remedial capacity radically restricted, for minorities and for problems of racial isolation.

Just as this Court in **Hunter v. Erckson**, 393 U.S 385 (1969), condemned a two-track system of lawmaking, under which local laws to combat racial discrimination in housing, however privately caused, were harder to enact than local laws addressing other housing matters, so the Court here should condemn a two-track system of law-enforcement, under which the state's

laws against racial segregation in schooling, however privately caused, are harder to enforce than are the state's laws addressing other schooling questions -- and under which the same policy tool, that of court-ordered pupil assignment or transportation, is rendered less available for purposes of racial integration than for all other purposes.

Even if racial discrimination were not built into the very terms of the state constitutional amendment here challenged, the aims of that amendment undeniably included its most conspicuous and significant effect: the imposition of added burdens upon, and the consequent segregation of, California's minorities. Relying only upon the self-serving announcement of more benign aims

in the amendment's own postcript, the court below failed to apply this Court's directions for uncovering racially discriminatory purposes and invalidating the measures they motivate.

Nothing could be more misleading than to suggest, as did the court below, that a law can escape scrutiny for impermissible racial discrimination, whether on its face or in its purposes and effects, by taking a bow in the direction of the Fourteenth Amendment. Just as a state law restricting minorities, and minorities only, to those rights and privileges already secured to them by the Fourteenth Amendment would blatantly deprive the persons subject to it of the equal protection of the state's own laws, so the state provision at issue here, although of somewhat narrower

compass, violates the state's fundamental duty to govern impartially.

ARGUMENT

I. ON ITS FACE, PROPOSITION 1 EMBODIES AN IMPERMISSIBLE RACIAL CLASSIFICATION

A. Proposition 1 Interposes Race-Specific Obstacles to State Judicial Relief

In the court below, petitioners argued that Proposition 1 employs an "explicitly racial classification." The court's only response was that the provision "embraces the protection of the Fourteenth Amendment and does not seek to violate it." [15] With all respect, that answer is wholly beside the point. There is no doubt that a

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[15] **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508.

state law, even while "embracing" the Fourteenth Amendment with one hand, might transgress its strictures with the other by imposing a race-specific burden upon the vindication of state claims. That is precisely the character of Proposition 1. For, as the court below authoritatively construed that proposition, 16/ it removes "court-ordered public school assignment and tranportation as a remedy available to cure state-proscribed racial imbalance in

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16/ This Court has recognized that it is "bound by the decision of [the state court] as though the meaning as fixed by the court had been expressed in the statute itself in specific words." **Guaranty Trust Co. v. Blodgett**, 287 U.S. 509, 513 (1933); **Kingsley Int'l. Pictures Corp. v. Regents**, 360 U.S. 684, 688 (1959); **Railroad Commission v. Pullman**, 312 U.S. 496, 500 (1941); **Smiley v. Kansas**, 196 U.S. 447, 455 (1905).

public schools." 17/ That rifle-shot removal of a remedy interposes a race-specific barrier to those -- principally racial minorities 18/ who seek to employ

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17/ **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508.

18/ Under the California Constitution, segregated schools are defined "in terms of the isolation of minority students from other students" and the principal focus is on the harm done to racial minorities. **Crawford I**, 17 Cal.3d at 303 n.15. But the Supreme Court also recognized that racially segregated schools "inflict considerable harm on white students and society generally" and that desegregation benefits "all students, both black and white." Id. (citations omitted). Cf. **Trafficante v. Metropolitan Life Insurance Co.**, 409 U.S. 205, 210 (1972) (whites injured by discriminatory housing practices directed against blacks have standing to sue for violation of federal civil rights statute). This case is, of course, not altered by the recognition that whites as well as minorities have a positive stake in racial integration of public schools.

the state's otherwise available governmental apparatus to vindicate their rights under state law.

Proposition 1's very language makes its racially slanted structure and meaning plain. After prohibiting mandatory student assignment in seemingly general terms, Proposition 1 specifies that a school board may nonetheless "voluntarily continu[e] or commenc[e] a school integration plan" after the amendment's effective date. This limited exception renders transparent what the prohibition might otherwise have concealed, or at least obscured: that the amendment is directed solely against, and applies only to, court-ordered student assignment plans for racial integration -- i.e., plans designed to end or reduce

racial separation that persists in the public schools in violation of state constitutional norms left intact by Proposition 1.

It bears emphasis in this connection that "Proposition 1 does not . . . change any substantive law of rights" under the state constitution. 19/ Thus, Proposition 1 does not substitute state approval of neighborhood schools, regardless of racial separation, for state proscription of racially segregated

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19/ **Crawford II**, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. See also id. at 655-656, 170 Cal.Rptr. at 509-510 (after Proposition 1, students continue to have the right to attend desegregated schools; "[t]his right, recognized in **Crawford** [I], supra, has not been removed by Proposition 1, which does not purport to change the duty imposed on a school board by California law to take all reasonably feasible steps to alleviate racial segregation in its schools regardless of cause.").

schools, regardless of cause. Leaving the substantive law of California on that subject unchanged, Proposition 1 alters only the availability of traditional remedies to redress violations of that law. That this is the meaning of Proposition 1 is clear not only from its express terms and from the construction given it by the Court of Appeal but also from the explanation offered by the Attorney General [20] and by the

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[20] State Atty. Gen. George Deukmejian's last-minute clarification of the proposition explained that "persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 . . . ." J.A. 280.

legislative analysis 21/ to which California law accords official

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21/ The "Analysis by Legislative Analyst" contained in the official California Ballot Pamphlet focuses exclusively on questions of "segregation" and "desegregation," observing that "This proposition would limit the power of California courts to require desegregation . . . . As a result, the proposition could affect 13 school districts which now have desegregation plans ordered or approved by a California court plus other school districts that are involved or could become involved in desegregation actions before California courts." J.A. 260 Unless segregation was caused by "government action with a discriminatory intent, . . . the proposition would prohibit a California court from ordering the school district to start a pupil school assignment or pupil transportation desegregation plan." J.A. 258, 260. Not a word is said about student assignment or transportation for other purpose.

status. 22/ Indeed, in papers filed with this Court, respondent Board of Education necessarily conceded that Proposition 1 addresses but "one narrow area: the power of a state court to order mandatory student assignment or

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22/ It is settled law in California that the legislative analysis contained in the ballot pamphlet "may be used to interpret an initiative measure." **Sanders v. Pacific Gas & Elec. Co.**, 53 Cal.App.3d 661, 672 & n. 11, 126 Cal.Rptr. 415 (1975) & cases there cited. The legislative analysis should be followed where it narrows and explains the intent of a provision arguably subject to more than one interpretation. See **Amador Valley Joint Union High School Dist. v. State Board of Equalization**, 22 Cal.3d 208, 245-46, 583 P.2d 1281, 149 Cal.Rptr. 239 (1978). And "[o]nce a particular legislative intent has been ascertained, it must be given effect 'even though it may not be consistent with the strict letter of the statute.'" **Friends of Mammoth v. Board of Supervisors**, 8 Cal.3d 247, 259, 502 P.2d 1049, 104 Cal.Rptr. 761 (1972). The same rules of interpretation apply to initiatives. **Sanders**, 53 Cal.App.3d at 672.

transportation as a desegregation remedy. 23/

The race-specific barrier created by Proposition 1 is manifested in four related ways: institutional, remedial, substantive, and temporal. All four reveal major obstacles that Proposition 1 interposes only where the wrong complained of involves racial separation or isolation -- segregation of students by race in the public schools. Specifically:

1. As an institutional matter, it is only with respect to racial separation that those urging the adoption of a pupil assignment or transportation plan to achieve

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23/ Brief in Opposition to Petition for Writ of Certiorari, at 9 (emphasis added).

ends mandated under state but not federal law must proceed without the aid, however necessary, of the state's judiciary;

2. As a remedial matter, it is only with respect to racial separation that those invoking state judicial assistance to vindicate rights secured by state but not federal law must proceed without resort to the remedial device of pupil assignment or transportation, however vital to the vindication of such rights;

3. As a substantive matter, it is only with respect to racial separation that those seeking relief through court-ordered pupil assignment or transportation, however indispensable to

the vindication of their claims, must show an independent federal right to such relief under the Fourteenth Amendment; and

4. As a temporal matter, it is only with respect to racial separation that those who have secured state judicial vindication of their claims through pupil assignment or transportation remedies must be prepared perpetually to defend the relief obtained against challenge "by any interested person."

Thus, when the California Constitution was amended to single out for special limitation what the court below identified as "the arsenal of techniques available to a state court to alleviate

racial school segregation," 24/ the State of California left that arsenal unencumbered by any parallel limitation in applying the same techniques to other problems, even with the aid of the state's courts; 25/ or in vindicating

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24/ **Crawford II**, 113 Cal.App.3d at 651, 170 Cal.Rptr. at 507.

25/ Proposition 1 is directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegregating the public schools. Mandatory student assignment for any other purpose -- such as relieving overcrowded schools or fulfilling the educational rights of handicapped children -- remains untouched.

Courts have ordered student assignment or transportation for a variety of purposes, including assistance to handicapped children, **Pinkerton v. Moye**, 509 F.Supp. 107 (W.D.Va. 1981); **Anderson v. Thompson**, 495 F.Supp. 1256 (E.D.Wis. 1980); **Elliott v. Board of Education**, 64 Ill.App.3d 229, 380 N.E.2d 1137 (1978) (Chicago school board must provide transportation for handicapped students where necessary to implement their state constitutional right to equal educational opportunities); **Matter of J.F.**, 91 (continued)

other rights protected more fully under

Misc.2d 445, 398 N.Y.S.2d 125 (1977); **In re Silver**, 79 Misc.2d 247, 359 N.Y.S.2d 851 (1974); **In re Downey**, 72 Misc.2d 772, 340 N.Y.S.2d 687 (1973); **Thomason v. County of Suffolk**, 66 Misc.2d 926, 332 N.Y.S.2d 762 (1971) (emotionally disturbed children); avoidance of hazards en route to school, **Shrewsbury v. Board of Education**, 265 S.E.2d 767 (W.Va. 1980); **People ex rel. Schuldt v. Schimanski**, 103 Ill.App.2d 780, 266 N.E.2d 409 (1971); and fulfillment of statutory obligations to provide transportation over certain distances, **Garnet Valley School District v. Hanlon**, 15 Pa.Commw. Ct. 476, 327 A.2d 215 (1975).

In California, courts have ordered student assignment or transportation to fulfill the state constitutional right to a free and equal education, **Manjares v. Newton**, 64 Cal.2d 365, 375, 411 P.2d 901, 49 Cal.Rptr. 805 (1966); the constitutional rights to free expression and due process under an interdistrict attendance agreement, **Myers v. Arcata Union High School District**, 269 Cal. App.2d 549, 75 Cal.Rptr. 68 (1969); the constitutional right to due process in school exclusion proceedings, **Abella v. Riverside Unified School District**, 65 Cal.App.3d 153, 135 Cal.Rptr. 177 (1976); and the statutory right to parental control over corporal punishment, **Burton v. Board of Education**, 71 Cal.App.3d 52, 139 Cal.Rptr. 383 (1977).

state than under federal law. 26/ The

26/ See, e.g., California Supreme Court rulings that rely upon the state equal protection clause to strike down a property tax system of public school financing (**Serrano v. Priest**, 18 Cal.3d 728, 760-68, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); **Serrano v. Priest**, 5 Cal.3d 584, 597-610, 487 P.2d 1241, 96 Cal.Rptr. 601 (1971) (education as a state fundamental interest; wealth as a state suspect classification)); to declare unconstitutional a statute prohibiting women from tending bar except in certain situations (**Sail'er Inn, Inc. v. Kirby**, 5 Cal.3d 1, 17-20, 485 P.2d 529, 95 Cal.Rptr. 329 (1971) (sex as a state suspect classification)); and to enjoin enforcement of state budget act provisions which restricted the circumstances under which public funds could be authorized to pay for abortions for indigent mothers (**Committee to Defend Reproductive Rights v. Myers**, 29 Cal.3d 252, 274-77 n. 22, 625 P.2d 779, 172 Cal.Rptr. 866 (1981) (privacy and right of women to choose whether to bear children as state fundamental rights)); and to accord procedural due process protections independent of the existence of an "'entitlement' that can be defined as 'liberty' or 'property.'" **People v. Ramirez**, 25 Cal.3d 260, 264, 599 P.2d 622, 158 Cal.Rptr. 316 (1979).

See also, **PruneYard Shopping Center** (continued)

fact that this explicit racial barrier is carefully structured not to impede state judicial enforcement of substantive Fourteenth Amendment standards in the school segregation context has no relevance whatever to the racial discrimination that Proposition 1 embeds in California's governmental structure. For it is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case.

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v. Robins, 447 U.S. 74, 81 (1980), aff'g 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979) (State of California may "adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

Proposition 1 is, therefore, constitutionally indistinguishable from the charter amendment struck down in **Hunter v. Erickson**, 393 U.S. 385 (1969). Even though the Fourteenth Amendment does not require fair housing laws as a remedy for de facto racial discrimination, this Court held that the city could not impose distinctive political burdens upon the establishment or re-institution of such a remedy. Id. at 390-91. See also id. at 395 (Harlan, J., concurring) (a provision that makes it more difficult for minorities to achieve their legislative goals is incompatible with any "neutral principle" of allocating governmental power). Accord, **Lee v. Nyquist**, 402 U.S. 935 (1972), aff'g 318 F.Supp. 710

(W.D. N.Y. 1970) (three-judge court). 27/

The fact that Proposition 1 restricts judicial relief from racial wrongs already condemned by state law while the

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27/ **Lee** struck down a statute creating a single exception, based upon race, to the state's broad supervisory powers over public education. In restricting minority access to judicial remedies for segregation, Proposition 1 also restricts the ability of the state judiciary to afford meaningful relief from unequal educational opportunites that violate the California Constitution. It thus strongly resembles **Lee**.

Cf. **Anderson v. Martin**, 375 U.S. 399 (1964) (state may not inject race into the political process by requiring racial designation on electoral ballot).

This Court has long recognized the necessity for judicial intervention to correct discriminations against racial minorities which deny them equal access to the political process. See **United States v. Carolene Products Co.**, 304 U.S. 144, 152-53 n. 4 (1938). See generally J.H. Ely, Democracy and Distrust 73-104 (1980).

charter amendment invalidated in **Hunter** restricted legislative relief from racial wrongs not yet (or no longer) so condemned makes this case, if anything, a stronger one than **Hunter**. For, as this Court recognized in **NAACP v. Button**, 371 U.S. 415, 430 (1963), "litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances. 28/

28/ The **Button** court also stated that

> litigation . . . is a means for achieving the lawful objectives of equality of treatment by all government, federal, state, and local, for the members of the Negro community in this country . . . . Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

Id. at 429 (footnote omitted).

Indeed, as the Court more broadly perceived in **Boddie v. Connecticut**, 401 U.S. 371, 375 (1971), "[i]t is to courts . . . that we ultimately look for the implementation of a regularized, orderly process of dispute settlement . . . . Only by providing that the social enforcement mechanism must function strictly within [Fourteenth Amendment] bounds can we hope to maintain an ordered society that is also just." Where, as here, a "judicial proceeding becomes the only effective means of resolving the dispute at hand . . . denial of . . . full access to that process raises grave problems for its legitimacy." Id. at 376. Those problems are exacerbated whenever "denial of full access" is the fate of racial minorities alone, or of persons

seeking to vindicate race-related claims only. Proposition 1 suffers on its face, and as authoritatively construed by the state's responsible authorities and by the courts below, from this fatal constitutional infirmity. At the very least, the racial warp built into the availability of California's judiciary by Proposition 1 should be treated by this Court as an inherently suspect racial classification requiring the strictest scrutiny and demanding the most compelling justification. 29/

29/ See **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 272 (1979) (citations omitted):

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justica-

(continued)

B. Proposition 1 Serves No Compelling Governmental Interest

Because Proposition 1 embodies an explicit racial classification that significantly disadvantages minority students, only a compelling state interest can justify it. Racial classifications may be upheld only where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." **McLaughlin v. Florida**, 379 U.S. 184, 196 (1964) (emphasis added). But California authorities can advance no legitimate, much less compelling, justification for Proposition 1.

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tion. . . . This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.

While the court below extolled the reasonableness of "conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment," **Crawford II**, 113 Cal.App.3d at 650, 170 Cal.Rptr. at 506, there can be no suggestion here that the very elimination of race-specific remedies is justified by the supposed virtues of color-blind government in cases such as this, [30] or that the very fact of conforming state to federal protections counts as an independent virtue. [31]

Although the amendment itself lists a number of interests it purports to

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[30] Cf. **Regents of the University of California v. Bakke**, 438 U.S. 265 (1978).

[31] See **PruneYard Shopping Center v. Robins**, 447 U.S. 74 (1980).

serve, 32/ it offers no straightforward justification for the burdens it imposes. It thus tacitly acknowledges that no such necessity exists. Instead, casting about for ostensibly neutral justifications, it provides a mere

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32/ The last paragraph of Proposition 1 states:

> In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectvely available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

laundry list of acceptable social goals, providing no explanation of why minority school children ought to bear special burdens in order to further those goals. Cf. **McLaughlin**, 379 U.S. at 193 (no reason provided for singling out a racial group for unique disadvantages). Moreover, while the constitutional remedies open to racial minorities are impeded to serve this host of other public interests, similar remedies for other groups -- such as handicapped children, who may require special transportation and additional public expenditures to achieve equal educational opportunities -- are not similarly impaired. Indeed, no other group of Californians is forcibly conscripted to serve the public good by relinquishing state equal protection remedies.

If less drastic means exist to serve the public interests asserted to justify an invidious classification, those means must be used instead. See **Memorial Hospital v. Maricopa County**, 415 U.S. 250, 263, 267-68 (1974); **Shapiro v. Thompson**, 394 U.S. 618, 633, 637 (1969). Every one of the interests listed in Proposition 1 could not only be served, but served more effectively, by racially neutral policies.

If student assignment and transportation must be limited to conserve the funds available to finance public education, to save fuel, and to protect the environment, then all school busing programs presumably should be cut back -- not merely those which would integrate formerly segregated minority

schools under court order. 33/ Yet Proposition 1 places no limits whatever on transportation provided to students who live far away from public schools or who encounter particular hazards in traveling to school ("distance" and "hazard" busing, Exh. 550; 69 R.T. 10,025-27), nor -- even more tellingly -- on transportation provided for so-called "voluntary" desegregation programs under which minority students

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33/ Indeed, because of the importance of mandatory reassignment to the fulfillment of a state constitutional right, transportation provided to desegregate minority schools should be the last, not the first, school transportation program sacrificed to the nonconstitutional interests asserted. See **North Carolina Board of Education v. Swann**, 402 U.S. 43, 46 (1971) ("bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it").

may ride school buses to predominantly white schools (Permits With Transportation (PWT)). 34/ Only mandatory reassignment and transportation for desegregation purposes are limited by Proposition 1.

Although Proposition 1 asserts an interest in "maximizing educational opportunities and protecting the health and safety of all public school pupils," it directly restricts the educational opportunities of minority children. A genuine interest in maximizing their educational opportunities would be best served by permitting and encouraging state courts to use all remedies

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34/ Although PWT ostensibly involves students of both races, in practice it has been an overwhelmingly (99% or greater) minority program. J.A. 342-44.

necessary or appropriate to fulfill their state constitutional rights. The health and safety of minority students are not served by requiring them to take lengthy bus rides (in Los Angeles up to 1-1/2 hours each way, J.A. 344; Exh. 363 (E); 84 R.T. 12099) to attend predominantly white schools, while permitting white children to remain in neighborhood schools. Only an equal distribution of transportation burdens for desegregation could fairly serve the health and safety of all children.

Similarly, Proposition 1 cannot equitably "enhanc[e] the ability of parents to participate in the educational process." For minority parents, it offers only a Hobson's choice between sending their children to nearby segregated schools or sending them to

far-away predominantly white schools (if transportation is available). Either way, parental participation in the educational process is not enhanced but constricted -- by distance and by the stigma attached to minority students under a system that singles out one race to bear the burdens of seeking to relieve the effects of segregation, or by the crippling of the educational process that racial segregation causes. See **Crawford**, 17 Cal.3d at 295 & n. 7, 296.

Nor may California "preserve[e] harmony and tranquility in this state and in its public schools" by subjecting racial minorities to unique governmental burdens. "[I]mportant as is the preservation of the public peace, this aim cannot be accomplished by laws . . .

which deny rights created or protected by the Federal Constitution." **Cooper v. Aaron**, 358 U.S. 1, 16 (1958), quoting **Buchanan v. Warley**, 245 U.S. 60, 81 (1917). "A State may not employ an invidious discrimination to sustain the political viability of its programs." **Memorial Hospital**, 415 U.S. at 266.

Analysis of the state interests asserted to justify Proposition 1 thus demonstrates the insubstantiality of their relationship to the burdens inflicted. In fact, the list is no more than threadbare camouflage for the actual interest served by Proposition 1 -- stopping the desegregation of minority segregated schools. That

interest is neither compelling nor legitimate. 35/

II. IN ITS PURPOSE AND EFFECT, PROPOSITION 1 INVIDIOUSLY DISCRIMINATES AGAINST RACIAL MINORITIES

A. Discriminatory Purpose May Be Inferred From the Totality of Relevant Facts

Even if the preceding argument, Part I, supra, were not dispositive,

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35/ Proposition 1's list of interests is also remarkably similar to lists in other cases where school boards have sought unsuccessfully to defeat constitutionally mandated desegregation programs requiring mandatory reassignment. See, e.g., **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1, 28, 29-31 (1971) (remedies for segregation are constitutionally required even if administratively awkward, inconvenient, and even bizarre in some situations"). See also **Lee v. Nyquist**, supra, 318 F.Supp. at 720 (where a statute disadvantages a racial minority in the political process no justification can be sufficient).

Proposition 1 should fall as an invidiously discriminatory measure. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." **Washington v. Davis**, 426 U.S. 229, 242 (1976). Not only does the burdensome impact of Proposition 1 fall principally upon minority students, but all relevant indicia of discriminatory intent establish that the amendment was enacted and adopted in significant part for the discriminatory purpose of reducing integration, or, stated differently, of increasing racial separation. Proposition 1 is thus unconstitutional under the Fourteenth Amendment.

The Constitution proscribes state action intended in any degree to increase racial separation. **Columbus Board of Education v. Penick**, 443 U.S. 449, 456, 464 (1979), see especially id. at 470 (Stewart, J., concurring); **Keyes v. School Disrict No. 1, Denver, Colorado**, 413 U.S. 189, 198 (1973); **Loving v. Virginia**, 388 U.S. 1 (1967); **Brown v. Board of Education**, 347 U.S. 483, 494-95 (1954). Cf. **Reitman v. Mulkey**, 387 U.S. 369, 374 (1967). Because of the nation's racial history, rarely, if ever, will any such purpose be openly and expressly declared. Determination of intent therefore depends upon careful review of the full context of the actions at issue, and reasonable interpretation of the actions' consequences.

In **Arlington Heights v. Metropolitan Housing Development Corp.**, 429 U.S. 252, 266-68 (1977), this Court identified several factors [36] (without purporting to be exhaustive) for analysis of proof of discriminatory intent. Ascertainment by these criteria that "a discriminatory purpose has been a motivating factor" in a particular decision or act removes any justification for judicial deference. [37] Id. at 265-66 (emphasis

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[36] The factors identified include: the impact of the decision or action at issue, i.e., whether it bears more heavily upon one race than another; the historical background; the specific sequence of events leading to the decision or action; the procedural and substantive departures from the norm in connection with the decision or action; and the legislative or administrative history of the decision or action.

[37] No doubt the racially discriminatory purpose will seldom be the only motivating factor. Particularly with respect to measures as complex and (continued)

added). The burden of proof then shifts to those defending the challenged conduct to "establish that the same decision would have resulted even had the impermissible purpose not been considered." Id. at 270 n. 21.

Of course, no such burden was or could have been discharged here. There is absolutely no affirmative reason to believe, certainly no sufficient basis to find, and no judicial determination to support the view that Proposition 1 would have been adopted independent of the racial considerations underlying

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controversial as Proposition 1, "legislators and administrators are properly cercerned with balancing numerous competing considerations." Id. at 265. Thus, some legislators and voters may have supported the amendment in part because, for example, they favored the neighborhood school concept or entertained various concerns over the use of busing as such.

it. In this case, therefore, the ultimate conclusion of racial discrimination under **Arlington Heights** coincides with the threshold determination that racial considerations played some role in motivating the measure's approval.

B. Racial Considerations Played a Role in the Enactment of Proposition 1

Examination of Proposition 1 in light of the **Arlington Heights** factors requires the conclusion that a racially discriminatory purpose to increase racial separation was not only a motivating factor in the adoption of the

amendment, but in fact was the dominant and pressing force. 38/

38/ The considerations which underlie this Court's insistence upon a showing of motive in cases like **Arlington Heights** themselves support an inquiry more searching here than that in **Arlington Heights** itself. For even if Proposition 1's establishment of a racial classification did not automatically trigger the strictest scrutiny under **Hunter v. Erickson** and **Lee v. Nyquist** (see Part I, supra), the amendment is indisputably not a racially neutral measure -- either in the sense of being wholly independent of race in its text and structure (cf. **Jefferson v. Hackney**, 406 U.S. 535 (1972); **Washington v. Davis**; **Arlington Heights**), or in the sense of using race in a wholly neutral and inconsequential manner. Cf. **Tancil v. Woolls**, 379 U.S. 19 (1964). At the very least, therefore, Proposition 1 should be assessed for racial motivation through an analysis less generous and forgiving than that applied in the series of cases from **Jefferson v. Hackney** through **Memphis v. Greene**, ___ U.S. ___, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981). Expressed otherwise, the racially discriminatory purpose this Court has held indispensable should be more readily pronounced as present in the context of measures such as Proposition 1 whose language and architecture set them apart as at least plausibly (continued)

1. **Impact**

To fix intent, "[t]he impact of the official action - whether it 'bears more heavily on one race than another'" - furnishes "an important starting point." **Arlington Heights**, 429 U.S. at 266. For where the adverse consequences of a law upon a minority are inevitable,

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suspect, than in the context of measures that would appear entirely innocent were one unaware of their differential impact, as a purely statistical matter, upon racial minorities. Cf. **Washington v. Davis**, 426 U.S. at 253-256 (Stevens, J. concurring); **Vlandis v. Kline**, 412 U.S. 441 (1973); **Hampton v. Mow Sun Wong**, 426 U.S. 88 (1976).

This is doubly so where, as here, the only reply of the state's courts to proof of racially discriminatory motive is to find "sufficient answer . . . in the constitutional amendment itself," to dismiss all else as "pure speculation," and to surmise that the "voters who adopted [Proposition 1] could have been motivated without segregative intent and discriminatory purpose . . . ." **Crawford II**, 113 Cal.App.3d at 654-55, 170 Cal.Rptr. at 509 (emphasis added).

"a strong inference that the adverse effects were desired can reasonably be drawn." **Personnel Administrator of Massachusetts v. Feeney**, 442 U.S. 256, 279 n.15 (1979). See also **Washington v. Davis**, 426 U.S. at 253 (Stevens J. concurring). 39/ Here, it is minority youngsters who sustain the overwhelming

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39/ Justice Stevens observed:

> Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds.

impact of Proposition 1. 40/ Moreover, even if Proposition 1 applied to court-ordered transportation for purposes other than desegregation, it would still disproportionately affect racial minorities as a group, and racial integration as an aim. For nearly all of the California litigation involving pupil assignment or transportation deals with desegregation.

40/ See Part I, supra. Indeed, prior to passage of Proposition 1 by the state's voters, the California Legislative Analyst had identified the "limit-[ation] [upon] the power of California courts to require desegregation" as the **only** impact of the amendment. See California Ballot Pamphlet, J.A. 260. The Analyst amplified upon this determination by pointing out that the limitation could affect 13 districts already under court order to desegregate, and additional districts that otherwise would become subject to future court decrees.

Proposition 1's prohibition against court-ordered student reassignment is enforceable without regard to whether alternative relief can be implemented, and, more particularly, without regard to whether applying the prohibition will undo an ongoing court-ordered desegregation program that requires pupil transportation to satisfy the state constitutional mandate that minority schools be desegregated. When enforced in the latter situation, the inevitable result of the amendment is therefore resegregation of minority schools. 41/

41/ Thus, in Los Angeles, for example, application of Proposition 1 to undo the mandatory components of the ongoing program caused minority schools which had been desegregated by the plan to become resegregated, and other minority schools which had had their levels of racial isolation substantially reduced to resume their prior levels of racial isolation. See pages A30-A31, (continued)

The racial separation of minority students at these schools necessarily increases. These students are then compelled to attend schools illegally segregated under the California Constitution, 42/ and, as a consequence,

infra. The Superior Court in the trial on review here found upon the evidence presented that mandatory reassignment was a remedy essential to the desegregation of the district's minority schools, J.A. 320-321 and this finding was not overturned by the Court of Appeal. The apparent contrary conclusion, made for the first time at the trial court level on September 10, 1981, may, of course, itself be overturned on appeal. Notice of Appeal from that decision was filed on October 22, 1981.

42/ Resort by some minority students at these schools to voluntary techniques of desegregation in order to attend predominantly white schools will not relieve the adverse impact of Proposition 1 upon minorities. Since the state constitutional objective to be achieved to vindicate minority students' rights remains the desegregation of minority schools, that objective will not be met by one-way transfer of minority pupils to white campuses. Moreover, all-voluntary programs which (continued)

"suffer serious harm. **Crawford I**, 17

rely principally on such one-way transfers have been held to place significant and disproportionate burdens on minorities. This was the specific finding of the trial judge at the trial on review here with respect to the use of voluntary programs in Los Angeles (J.A. 345-46), and this determination was not reversed by the Court of Appeal in **Crawford II**. This ruling was consistent with numerous federal decisions. See, e.g., **Reed v. Rhodes**, 607 F.2d 717 (6th Cir. 1979), aff'g 455 F.Supp. 569, 608 (N.D. Ohio 1978); **NAACP v. Lansing Board of Education**, 559 F.2d 1042, 1059 (6th Cir. 1977), aff'g 429 F.Supp. 583, 620 (W.D. Mich. 1976); **Cisneros v. Corpus Christi Independent School District**, 467 F.2d 142, 153 (5th Cir. 1972); **Martin v. Charlotte-Mecklenburg Board of Education**, 475 F.Supp. 1318, 1340 (W.D.N.C. 1979); **Arthur v. Nyquist**, 473 F.Supp. 830, 839-40 (W.D.N.Y. 1979); **Evans v. Buchanan**, 435 F.Supp. 832, 840 (D.Del. 1977).

See also Poussaint, "Education and Black Self-Image," Freedomways 5 (Fall 1968):

> Since integration is only a one-way street that Negroes travel to a white institution, then an implied inferiority of the Black man is inherent in the situation because it is he who must seek out whites to better his prob-

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Cal.3d at 295. 43/ Even more, termination of existing desegregation programs communicates to minorities an official message that their rights are transitory, to be enjoyed only so long

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lem. This implies that only he can benefit and learn; that he has nothing to offer whites; that whites have nothing to learn from him or his presence.

43/ In addition, the trial court in this case found in 1970, as affirmed in 1976 by the California Surpeme Court, that the "plant, teachers, physical facilities and curriculum" at minority segregated schools in Los Angeles were "in fact of poorer quality than the plant, teachers, physical facilities and curriculm at [the district's] predominanty white schools." J.A. 37; **Crawford I**, 17 Cal.3d at 289. This finding was not affected by the appellate decision in **Crawford II**.

as any individual member of the community chooses not to invoke the amendment. 44/

44/ Cf. **Wright v. Council of City of Emporia**, 407 U.S. 451, 465-66 (1972):

> The timing of Emporia's action is a third factor that was properly taken into account by the District Court in assessing the effect of the action upon children remaining in the county schools. While Emporia long had the right under state law to establish a separate school system, its decision to do so came only upon the basis of -- and, as the city officials conceded, in reaction to -- a court order that prevented that county system from maintaining any longer the segregated system that had lingered for 15 years after **Brown I**. In the words of Judge Winter, dissenting in the Court of Appeals, "[i]f the establishment of an Emporia school district is not enjoined, the black students in the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system." 442 F.2d, at 590. The message of this action,

(continued)

Finally, even where Proposition 1 is invoked not to dismantle an existing plan but to frustrate imposition of a program using mandatory reassignment, its adverse effects are still felt principally by minorities. In districts in which courts would properly find pupil transportation essential to desegregate minority schools, the amendment leaves those schools both undeniably separate and demonstrably

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coming when it did, cannot have escaped the Negro children in the county. As we noted in **Brown I**: "To separate [Negro school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494.

Cf. **Regents of University of California v. Bakke**, 438 U.S. 265, 391-93 (1978) (Marshall, J., separate opinion).

inferior -- in continued but now irreparable violation of the state's own equal protection clause.

2. Sequence of events

This Court stated in **Arlington Heights**, 429 U.S. at 267, that it would have had "a far different case" if the town had "suddenly" changed the zoning classification of the property there at issue when it learned of the respondent development corporation's plans to erect integrated housing. It is significant, then, that Proposition 1 was enacted by the California Legislature and adopted by the electorate promptly after a desegregation plan was instituted in Los Angeles and, most particularly, after the trial court's panel of experts recommended broadening of that plan into

a metropolitan desegregation program. 45/

The Ballot Pamphlet made clear that this overlap in timing was not coincidential. 46/ Likewise, newspaper reports regarding Proposition 1 described its impetus as deriving from the commencement of desegregation in Los Angeles, and from concerns over the possible imposition of an interdistrict plan. 47/

45/ See pages 15-16, 18-19, supra.

46/ See, e.g., "Arguments in Favor of Proposition 1," "Arguments Against Proposition 1," and "Rebuttal to Argument Against Proposition 1," California Ballot Pamphlet, J.A. 267-79.

47/ The following excerpts from the articles are illustrative:
Richmond Independent, Jan. 14, 1979:

> Another measure to restrict the power of state courts to order schools to integrate has (continued)

begun to move through the Legislature, and supporters think it will pass this time.

The constitutional amendment, aimed primarily at overturning Los Angeles' mandatory busing program, was sent to the Senate floor Wednesday by the upper house's Education Committee.

* * *

This year, supporters are relying on the fear of many Los Angeles-area residents that the Los Angeles plan will spread to nearby districts. They say this fear should give them the votes needed to get the amendment out of the Assembly Judiciary Committee, its stumbling block in past years.

J.A. 201.

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Los Angeles Times, Jan. 18, 1979:

The [Assembly] Committee has killed the Robbins Amendment twice in the past, with [Assemblyman] Imbrecht among those who refused to vote for it. However, since the vote last year, the metropolitan plan has been proposed, and it is conceivable

(continued)

3. Procedural and substantive departures from the norm in connection with the decision or action

"Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." **Arlington Heights**, 429 U.S. at 267 (footnote omitted). The adoption of

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that its adoption could require the busing of students from Imbrecht's district to help integrate Los Angeles schools.

The metropolitan plan, he said, helped him decide that something about busing must be done. Robbins has contended all along that the metropolitan plan has been his most important ally this year.

J.A. 203-04.

Proposition 1 was indeed characterized by exceptional procedural and substantive departures from the norm-departures indicative of its racially discriminatory intent. Pursuant to the normal procedural sequence, Proposition 1, once legislatively enacted, would have been placed before the electorate on the June 1980 ballot. Proponents of the amendment instead sought and obtained legislation authorizing an early special election. 48/

Adoption of Proposition 1 also departed from the procedural norm in that judicial decision-making (e.g., **Jackson, Crawford**) was overridden in a

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48/ See pages 19-20, supra. The proponents also secured unusual special clarifications of Proposition 1 from state officials. See pages 21-22, supra.

state-wide initiative by voters, a large percentage of whom were not personally affected by any ongoing or conceivable plan. See **Seattle School Dist. No. 1, Etc. v. State**, 473 F.Supp. 996, 1016 (W.D. Wash. 1979), aff'd in part and rev'd in part, 633 F.2d 1338 (9th Cir. 1980), prob. jur. noted, 50 U.S.L.W. 3278 (U.S., Oct. 13, 1981). The amendment represented a singular effort through the statewide initiative process to upset enforcement of a local judgment, and to deprive successful litigants (petitioners here) of the specific relief they had already won. 49/

49/ Indeed, the tradition in American law has been profound resistance to legislation designed to alter the course of litigation pending on review, cf. **United States v. Klein**, 80 U.S. (13 Wall.) 128 (1871), or designed to undo the result of litigation already concluded. Cf. **Calder v. Bull**, 3 U.S. (3 Dall.) 386 (1798).

Substantively, too, Proposition 1 is remarkable in California: it exists as the only amendment since adoption of the state constitution in 1850 that restricts the autonomy of California courts with respect to an identified subject matter, or constricts their remedial capacity in addressing a particular problem.

More broadly, Proposition 1 severs the link between right and remedy recognized as the "very essence of civil liberty" as long ago as **Marbury v. Madison**, 5 U.S. (1 Cranch) 137, 163 (1803). It thereby represents an extraordinary foreclosure of meaningful access to the courts for vindication of rights substantively secured by the applicable body of law. See, e.g.,

Little v. Streater, ___ U.S. ___, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981); **Boddie v. Connecticut**, 401 U.S. 371 (1971); **Payne v. Superior Court**, 17 Cal.3d 908, 916, 553 P.2d 565, 132 Cal.Rptr. 405 (1976).

Finally, the amendment provision permitting "any interested person " (defined by the Legislative Analyst to mean "any person" J.A. 261) to secure modification of an "existing [state court] judgment, decree, writ, or other order" is unique to California constitutional and statutory law because it places no limit on the persons who may attack such judgments or on the timing or number of challenges that may be brought. 50/ Cf. California Code of

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50/ In the same vein, the amendment requires all courts to give Proposition (continued)

Civil Procedure §§367, 369.

4. Legislative history

Legislative history likewise "may be highly relevant, especially where there are contemporary statements by members of the decision-making body . . . or reports." **Arlington Heights**, 429 U.S. at 268. Thus, the "Analysis by Legislative Analyst" defined the foreseeable consequences of Proposition 1 solely in terms of its restrictive effect upon the

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1 "actions or proceedings first precedence over all other civil actions . . . ." While only a few California statutes have accorded certain actions special precedence over other matters except as to matters granted equal precedence by law, e.g. California Code of Civil Procedure §§1062(a), 1179(a), even fewer statutes and no constitutional amendment previously compelled civil courts to give designated actions superior precedence to all other court business.

power of courts to direct desegregation. J.A. 260.

The Attorney General's clarification of the amendment stated that "[t]he persons and groups which are against mandatory busing to achieve racial integration in the schools are generally in support of Proposition 1 . . . ." J.A. 280. Significantly, this characterization described the opposition to "mandatory busing" only in terms of its use for integration purposes. Were the proponents more broadly opposed to pupil transportation as a technique to remedy any state constitutional or statutory injury, or supportive of the "neighborhood school concept" in all circumstances, their

position would hardly have been so carefully and damagingly limited. 51/

51/ The legislative history of Proposition 1 fits within the amendment's broader historical context. **Arlington Heights**, 429 U.S. at 28. Cf. **Reitman v. Mulkey**, 387 U.S. 369, 373 (1967). As detailed in the Statement of the Case at pages 8-12, Proposition 1 is but the latest, most sophisticated, and most extreme of numerous efforts to defeat integration (particularly when understood to mean desegregation of minority schools in minority communities), and increase racial separation within California.

Moreover, these efforts have always intensified whenever the prospect of integration verged on realization. See note 2, supra, at pp. 10-11. There has been an overall acquiescence in minority rights in the abstract, but fierce resistance to their concrete enforcement.

In Los Angeles, the historical background of Proposition 1 reveals an entire series of actions designed to prevent imposition of court-ordered desegregation. For example, the President of the Los Angeles Board was recalled for what was perceived as his support for pupil transportation to accomplish desegregation. J.A. 247-56. Members of the Board engaged in (continued)

C. The Motivating Role of Race Was Decisive

At trial, only petitioners submitted evidence bearing on the motives animating Proposition 1. Neither the board nor any other party offered any evidence that the amendment was not motivated in part by a racially discriminatory purpose. Similarly, there was no claim (nor any proof supporting any such claim) that the amendment would

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conduct and issued public statements which, as the trial court found, significantly encouraged and exacerbated public opposition to the Board's own 1978 program. J.A. 318, 357-59. Indeed, Board members went so far as to urge the California Supreme Court to stay implementation of its 1978-79 plan, just days before the start of school. J.A. 331-32.

have been enacted even had the impermissible purpose not been considered. 52/

52/ Proof to overcome a shift in burden would have been difficult to adduce in the circumstances of this case. Studies have demonstrated, for example, that white attitudes against busing are most frequently symbolic, and that racial intolerance is the strongest predictor of opposition. See, e.g., D.O. Sears, C.P. Hensler, and L.K. Speer, "Whites' Opposition to Busing: Self-Interest or Symbolic Politics?" 73 American Political Science Review, 139-51 (1980). See also G. Orfield, Must We Bus 116-17 (1978) (studies demonstrate that parents oppose pupil transportation only when transportation is for purposes of school integration).

In contrast with the measures upheld by this Court in the context of welfare distribution (**Jefferson v. Hackney**), employment criteria (**Washington v. Davis**), zoning policy (**Arlington Heights**) and veterans' benefits (**Feeney**), it hardly seems plausible that Proposition 1 would have been approved by California voters (or even proposed by its sponsors) if a bar to pupil transportation had not been regarded as a means to increase racial separation, or (assuming the tables were turned) if pupil transportation had been perceived (continued)

The Superior Court did not inquire into petitioners' evidence. It consequently entered no findings of fact or conclusions of law regarding intent. The court instead held Proposition 1 inapplicable to the case because de jure segregation had been found by the Superior Court in 1970, and affirmed in 1976 by the California Supreme Court. 53/

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as a means to increase racial separation, not to achieve racial integration.

53/ At minimum then, if this Court does not find Proposition 1 unconstitutional, the case should be remanded to the trial court for appropriate findings. Cf. **Columbus Board of Education v. Penick,** 443 U.S. at 457 n. 6 (opinion of the Court) and 469-71 (Stewart, J., concurring); **Dayton Board of Education v. Brinkman,** 443 U.S. 526, 534 n. 8 (1979) **(Dayton II)** (opinion of the Court) and 544 n.* (Rehnquist, J., dissenting; **Dayton Board of Education v. Brinkman,** 433 U.S. 406, 419 (1977) **(Dayton I).**

The Court of Appeal also conducted no evidentiary evaluation of, and made no factual findings about, why Proposition 1 was proposed and approved. Remarkably, it accepted as "sufficient answer" to petitioners' claim concerning the intent of Proposition 1 the amendment's self-contained and self-serving statement of purpose. **Crawford II**, 113 Cal.App.3d at 654, 170 Cal.Rptr. at 509. The court added that efforts to prove impermissible intent constituted "pure speculation," and then asserted its "belie[f]" that Proposition 1 "could have been motivated" by the same considerations expressed by Justice Powell in **Estes v. Metropolitan Branches, Dallas NAACP**, 444 U.S. 437, 450-51 (1981) (dissent from dismissal of writs of certiorari as improvidently

granted). **Crawford II**, 113 Cal.App.3d at 655, 170 Cal.Rptr. at 509. It thus flouted the holdings of **Washington v. Davis**, **Arlington Heights**, and **Feeney**, that where a law is challenged as racially discriminatory in intent, courts must carefully review the evidentiary record to determine whether any such intent existed and, if so, whether the law would have been enacted in the absence of that improper purpose.

Upon an appopriate **Arlington Heights** review of the record made below, both courts should have found that racial discrimination was a decisive motivating factor behind the enactment and adoption of Proposition 1. By any and all of

that decision's criteria, there was evident a constitutionally impermissible intent.

Indeed, the reality is that any other result ought to have been striking. Few persons contend today that opposition to court-ordered desegregation programs like the ones here dismantled or precluded by Proposition 1 is entirely single-minded, that its only motive is racially discriminatory in character. But it would be extraordinary to claim that racial discrimination was wholly immaterial to the decision to enact the amendment at issue here.

CONCLUSION

Extending the substantive protection of state law to racial minorities who

find themselves and their children effectively trapped in separate and unequal schools, California has uniquely hobbled such protection in the single context of race by stripping its courts of remedies often indispensable for coping with segregated education. It is unclear that a state has power under the federal Constitution to extend such "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." **Edwards v. California**, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). But for a state to extend so hollow a guarantee solely to its racial minorities -- while making its judicial apparatus fully meaningful for all others -- is surely to deny such minorities the equal protection of the laws in the most

obvious and axiomatic sense of those terms. Having done so for reasons that were themselves anything but racially neutral, the State of California has doubly offended the Fourteenth Amendment while purporting disingenuously to embrace its terms. The decision permitting that stratagem should not be allowed to stand. Therefore the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

The 18-Year History of School Desegregation Litigation in Los Angeles

Minority students in the LAUSD brought this action in 1963, a few months after the California Supreme Court ruled in **Jackson v. Pasadena City School District**, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that the state constitution requires California school boards to take all reasonable and feasible steps necessary to end racial segregation in the public schools, regardless of the cause of that segregation. After a five-year delay, while petitioners sought unsuccessfully to persuade the Board to begin desegregation on its own, [1] and following eight

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[1] See **Crawford v. Board of** (continued)

months of hearings, the trial court entered its findings of facts and conclusions of law in May 1970. J.A. 5.

The court found that the Board "has . . . since at least May of 1963, knowingly, affirmatively and in bad faith . . . by and through its affirmative policies . . . and practices, . . . segregated, de jure its students." **Crawford** I, 17 Cal.3d at 288; J.A. 42. It found that minority schools in Los Angeles were pervasively segregated and inferior, 17 Cal.3d at 289; J.A. 36, 37, 39, 51 [2/] , that the segregation was

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Education, (**Crawford** I) 17 Cal.3d 280, 287, 551 P.2d 28, 130 Cal.Rptr. 724 (1976); Report of the United States Commission on Civil Rights, A Generation Deprived, Los Angeles School Desegregation 7-8 (May 1977); J.A. 323.

[2/] The court held the Board accountable for willfully failing to (continued)

substantial and increasing, 17 Cal.3d at 287; J.A. 19-30, and that despite knowledge of these facts, the Board had refused even to begin planning for desegregation. 17 Cal.3d at 288; J.A. 46-47. (Instead, the Board had contended that it had no constitutional duty to remedy the existing segregation, 17 Cal.3d at 289-90, and that the financial costs of desegregation outweighed any possible educational benefits. 17 Cal.3d at 288; J.A. 46.) The trial court ordered the Board to

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"ma[k]e available to all its pupils equal educational opportunity." J.A. 51.

The court also found "not true" the "Board's . . . position" that "the educational abilities of the Negroes and Mexican-Americans are inherently or genetically inferior to the Whites." J.A. 94-95.

adopt and implement a desegregation plan. 17 Cal.3d at 289; J.A. 134.

The appellate process following the trial court's decision ended in 1976 with the California Supreme Court's ruling in **Crawford** I, unanimously affirming the lower court's judgment. 3/ Like the trial court, the Supreme Court left the development of a suitable plan to the Board. It indicated, however, that mandatory reassignment might be required to fulfill the constitutional mandate to desegregate minority segregated schools. 4/

3/ The Supreme Court disagreed with the trial court in only one respect, holding that its definition of a segregated school was overly rigid. 17 Cal.3d at 303-04.

4/ "[I]n some circumstances busing will be an appropriate and useful element in a desegregation plan." 17 Cal.3d at 309.

On remand, after 12 weeks of hearing testimony, the trial court rejected the Board's first proposed desegregation plan [5] on the grounds that "it does not

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[5] The plan relied upon voluntary options, except for one mandatory provision that brought together children in a minimum of 50 elementaries each school year for 10 days of shared field trips in grades 1 through 3, and for approximately 3 months of shared partial-day instruction at neutral sites in grades 4 through 6. Exhibit A; 1 R.T. 24 (3/23/77). The principal voluntary component was a oneway busing program called Permits With Transportation (PWT) that in operation transported minority students to white campuses for bus rides of up to 1-1/2 hours one-way at three times the cost of usual district transportation. J.A. 160.

The court specifically found that the Board's first plan

> was hastily conceived as a reaction to the implications of the CACSI plan and that no effective in-depth study was made of the effect of the plan upon segregated schools of this district, nor any cost/benefit analysis made of the plan, nor any alternative plans seriously

(continued)

desegregate any school in the district and even [if it did], it would reach so few of the 231 segregated minority schools as to be wholly ineffective in desegregating this district." Minute Order of July 5, 1977, J.A. 147-48. The court held the plan unconstitutional and directed the Board to prepare a new one within 90 days. J.A. 162.

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considered.
J.A. 161.

The CACSI (Citizens' Advisory Committee on Student Integration) plan was developed by a community-based group which had been established by the Board for the stated intent of obtaining broadly-grounded recommendations and support for district desegregation. Exhibit A, supra. The plan returned by the CACSI group utilized among other techniques mandatory reassignment to desegregate most of the district's minority segregated schools. Immediately after receipt of the plan, the Board disbanded and defunded the group. See generally A Generation Deprived, supra, at 20-54.

During the hearings on the first plan, several Board witnesses testified that some mandatory reassignment of students would be necessary for effective desegregation. 6/ The Board's

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6/ Deputy Superintendent (now Superintendent) Dr. Harry Handler's conclusion was representative:

> Q. Mr. Handler, there is no question in your mind, sir, is there, that some type of mandatory program is necessary in the L.A. Unified School District in order to reduce, let alone eliminate, segregation now existent in many of the L.A. schools, is that true, sir?
>
> A. It is my opinion that a degree of mandatory activity would be required in the Los Angeles Unified School District.
>
> 3 R.T. 335; 3/25/77.

The Board had expressed the same opinion seven years earlier, in its brief filed with the state Court of Appeal on appeal from the 1970 judgment:

> Another question that should be answered is whether a compul-

(continued)

second plan, Plan II, reassigned some students in a limited number of schools in grades 4 through 8, but primarily relied upon so-called "voluntary" techniques, like magnet schools and Permits With Transportation (PWT). The trial court, finding that the plan

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sory integration program can be effectively implemented in only a part of the district.

> All witnesses who addressed themselves to this question seemed to agree that to be effective an integration plan must (1) prescribe racial quotas and balances; (2) it must be mandatory -- not voluntary or permissive; (3) it must be at least districtwide in effect, and preferably it should include school districts surrounding the Los Angeles Unified School District; and (4) it should be accomplished by supportive services to promote beneficial interaction between the mixed racial groups.

Brief of Appellant, 2d Civil No. 37750, Point XI, p. 135.

"[p]atently . . . does not comply with th[e] [**Crawford**] standard," J.A. 172, permitted the Board to go forward with it as "an important initial step toward . . . eventual compliance . . . ." but required the Board to submit appropriate modifications and amendments at a later date. Minute Order of February 7, 1978, J.A. 173. The trial court also appointed eight experts on school desegregation -- social and political scientists -- to study and report back to the court on questions including the need for improved voluntary provisions or mandatory reassignment to desegregate minority schools and for "any additional provisions against resegregation by reason of white flight." J.A. 176.

In late August and early September, 1978, both intervenor Bustop, a San

Fernando Valley-based organization, and the respondent Board tried to block implementation of the mandatory portion of the Board's Plan II. The California Supreme Court [7] and Justices Rehnquist and Powell [8] refused to do so, and the plan went into effect in September 1978. The mandatory portion of the plan involved only a small fraction -- about

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[7] On August 31, 1978, Bustop obtained from the Court of Appeal a writ of supersedeas staying implementation. **Bustop v. Superior Court**, (2d Civil No. 54392). Petitioners then petitioned the state Supreme Court to overturn the stay. On September 5, 1980 the Board filed papers joining Bustop to request that the Court continue the stay (Board Memorandum in L.A. No. 31018; 57 R.T. 8512-8513). Petitioners' petition was granted the following day, and the stay was lifted.

[8] **Bustop, Inc. v. Board of Education**, 439 U.S. 1380 (1978) (Rehnquist, J. Circuit Justice); **Bustop Inc. v. Board of Education**, 439 U.S. 1384 (1978) (Powell, J., Circuit Justice).

seven per cent -- of the district's total enrollment. 9/

Two months later, in November 1978, the court's desegregation experts submitted their reports. They agreed that mandatory reassignment was necessary for effective desegegation in Los

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9/ Within the participating grades, mandatory desegregation reached only 165 schools (148 elementary; 17 junior high; 29% of the district's 563 schools); and only 41,084 students (14,719 white students, 26,365 minority students; approximately 7% of the district's total enrollment of 547,546 students, 9% of the district's 161,925 white student population, and less than 1% of the district's minority student population). Among those excluded from the board's plan were approximately 262,000 students attending 204 minority segregated schools, and approximately 65,500 students in non-participating grades who attended schools in the mandatory program. Plan II also sent nearly 19,000 minority youngsters to white campuses on bus rides longer than those within the mandatory program, as part of its one-way (99.9% minority), voluntary PWT program. Source: LAUSD figures.

Angeles and that ultimately, long-term desegregation for Los Angeles required interdistrict (metropolitan) relief. 10/

In March 1979 the Board returned a seven-volume reply to the trial court's request for improvements and modifications to Plan II to achieve greater

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10/ The experts also agreed that voluntary programs like PWT have adverse effects upon minority students and their communities, and should only be employed after mandatory options have been exhausted (e.g. Exhibits II-359 (pp. 4951, 100), 360 (pg.100) 553 (pp.29-30;47) (80 R.T. 11624); that a mandatory program would not significantly affect the already-existing demographic decline in the district's white student population (e.g. Exhibits II-354 (pp. iv, vi, 38, 44, 45, 359, (pg. 18), 553 (pg. 39) (80 R.T. 11624)); and that by limiting its mandatory program to grades 4 through 8 the Board had retarded public acceptance of desegregation and had otherwise denied important benefits of desegregation to the district's students (e.g. Exhibits II-358 (pg. 97), 359 (pp.51-52, 95), 360 (pp. 46-47, 49-51), 553 (pp.16-20, 82, 148, 152, 153, 162)) (80 R.T. 11624).

desegregation. Response to Court Order of February 7, 1978, 33 C.T. 9830. Its new Plan III continued to rely upon mandatory reassignment but reduced the number of schools participating in the mandatory portions of the program. Neither new grades nor new schools were added.

School board elections were held in June 1979. Three members of the seven-member Los Angeles Board who had supported Plan III left office. One of them, Board President Howard Miller, was recalled. J.A. 256. All three were replaced by members who had campaigned for an end to mandatory reassignment. 56 R.T. 8254-55. The new majority promptly voted to endorse Proposition 1 on the upcoming November ballot. See 57 R.T. 8516-17; J.A. 555-57. The new majority also voted to withdraw Plan

III's proposals for mandatory desegregation and to seek court approval for an all-voluntary plan, which had not yet been developed. [11] Hearings on the

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[11] Associate Superintendent for School Integration Phil Jordan, who organized and coordinated all staff efforts regarding desegregation, testified at the subsequent trial that prior to September 24, 1979 -- the date of the Board's vote to withdraw its mandatory proposal -- his office had undertaken none of the preliminary steps that would reasonably precede such a change in intent and direction. Jordan stated that between February 1978 (the date of the court's order giving temporary approval to Plan II pending further board efforts) and September 24, 1979, he had never discussed with any board member, School Superintendent William Johnston, or any of Johnston's top level staff the subject of the design and implementation of an all-voluntary program to replace what was then the district's present mandatory plan. 56 R.T. 8211, 8213-14; 55 R.T. 8204. Neither Jordan nor his office was requested to analyze, nor did they analyze, the relative capabilities of voluntary and mandatory programs to desegregate the district or to reduce white loss from implementation of a plan. 55 R.T. 8196-97, 8204.
(continued)

Board's new proposal began in October 1979 and continued into April 1980, 12/ with the Board now contending -- for the first time in this litigation -- that

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Jordan also described a Board meeting of August 27, 1979 at which two motions were passed with respect to the then ongoing Board mandatory program. The first directed Board counsel to seek on October 15 discontinuation of all junior high reassignment as soon as possible; the second . directed counsel to seek termination of any bus route in the mandatory program which ran 60 minutes from first pickup to the start of school, regardless of whether (or how many) children on the identified routes actually travelled for as long as an hour. 56 R.T. 8233-38; Exhibit 375. Staff analyses calculated that these motions, taken together, proposed the removal of 35,000 of the between 38,000 and 40,000 students then participating in the mandatory plan. Two weeks before the beginning of school year 1979-80 (Plan II, year 2), the Board had thus acted to take apart its mandatory program.

12/ The Board did not actually complete and file its proposed all-voluntary plan (Plan IV) until November 16, 1979, nearly a month into the ongoing hearings.

only a voluntary desegregation plan could work in Los Angeles. 13/

The main dispute during the lengthy hearings was thus whether the Crawford mandate could be satisfied by resort to an all-voluntary program, or whether an acceptable plan had to contain among its various elements at least some mandatory reassignment.

In orders issued on May 19 and July 7, 1980, the court rejected the Board's new arguments. 14/ It concluded

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13/ See, e.g., Remarks of Board counsel David Peterson, 1 R.T. 5A.

14/ The July 7 Order made final (with certain modifications) the court's May 19 intended order. On that earlier date, the court had entered its three-page Proposition 1 ruling, Cert. Pet. App. 76A. The order denied motions made by Bustop and the Board on November 15, 1979, to eliminate all portions of desegregation orders requiring mandatory reassignment, holding that the amendment, "even if constitutional, [did] not (continued)

instead that an all-voluntary program would desegregate no minority schools within Los Angeles, could not reasonably be expected to do so, and would place grossly disproportionate burdens on the district's minority children. The court held that the Board's all-voluntary plan "treat[ed] minority children with less concern than other children in the district," unreasonably and unrealistically relied entirely on voluntary desegregation by children and parents, and failed to show any commitment by the Board "to produce meaningful progress in the desegregation of the district's minority schools. . . ." J.A. 321. 15/

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change the terms of the mandate . . . as that mandate and the federal obligations under federal case law are not inconsistent and require identical remedies." Cert. Pet. App. 79A.

15/ The court also found: (continued)

Although the Board relied upon the

FINDINGS OF FACT

30. That the plan of the respondent depends exclusively upon voluntary transfers of both white and minority children, requested and initiated by the parents of those children. That the respondent does not expect to desegregate minority schools by this plan, but to provide a desegregated experience for some minority children.

31. That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools. That any success which may have been achieved is within its PWT program, which program is used exclusively by minority children to transfer on a daily basis from their minority schools to white schools, thus resulting in no desegregation of minority schools. That the history of magnet schools has also been one of failure to desegregate minority schools and has shown only limited promise in the creation of new desegregated schools.

32. That the all-voluntary plan proposed by the respondent (continued)

refusal of white parents and students to

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board holds no promise of meeting the mandate in the desegregation of minority schools.
J.A. 459-60.

The trial judge's findings were strongly supported by the evidence. Court-appointed expert Dr. Gary Orfield, a professor of political science at the University of Illinois who has researched and published extensively in the area of school desegregation, testified that it was "extremely unlikely" that board's all-voluntary proposal would desegregate any minority schools in the district. 64 R.T. 9169. He stated without contradiction that an appropriately drawn and administered mandatory program could desegregate minority schools given the results consistently obtained in other communities where such programs had been judicially ordered (including many large urban centers and communities where racial hostilities were especially intense). 65 R.T. 9359-65.

See also testimony of Drs. Christine Rossell 66 R.T. 9475-9550; Gordon Foster 82-83 R.T. 11798-959; Michael Stolee, 78 R.T. 11234-392; and results of computer simulations of voluntary and mandatory plans, Exhibit 202, p.392 (85 R.T. 12135) and 65 R.T. 9302-11, 9444-45, 85 R.T. 12,176-199, 12,202-08, 66 R.T. 9581-83.

Attendance figures for school years 1978-79 and 1979-80 demonstrated that (continued)

participate in Plan II to support its

magnet programs established under Plan II had uniformly failed to attract white students to minority campuses, even though the programs were concededly high quality and well-publicized, and students not electing to enter magnets would in most instances be required to participate in the mandatory program. Minority enrollments at magnet schools previously 95-100% minority remained in that range. See Exhibit 394, 5 R.T. 662. See the following enrollment figures at minority campus magnets:

SCHOOL	% MIN 1978	% MIN 1979
Fremont	100	99
Belvedere	100	98
102nd St.	100	100
93rd St.	---	100
Markham	---	100
Dublin	99	100
107th St.	98	100
Riggin	98	95
111th St	96	99
El Sereno	100	96
Griffith	91	93
Ambler	89	82
32nd St.	82	84
Fillmore	---	82
Peary	77	86
Stevenson	76	84
Amestoy	---	79
Figueroa	---	79

Source: Exhibit II-394.

Review of the operation of the (continued)

contention that mandatory desegregation

Board's Permits with Transportation program (PWT) was to the same effect. Heavy recruitment of white students had not succeeded in changing the program's one-way character; only 323 of the 18,674 participants (1.7%) electing to leave their neighborhood schools in school year 1979-80 were white. Exhibit 79, 29 R.T. 4419. Moreover, the court found that PWT in Los Angeles had caused significant harm to participating minority students and their sending schools, and ought properly be utilized only where no other desegregation options were available:

> There are usually only disadvantages to the [PWT] sending school and few advantages. The minority sending school remains segregated. There is no history of a reverse PWT influx into sending schools by white students. PWT in most instances by its very nature drains many bright and highly motivated children from their resident schools to the detriment of those schools. . . .
>
> * * *
>
> The minority child's PWT experience does not remove the stigma attached to the sending school or the stigma to the child of going from that sending school who

(continued)

would not work in Los Angeles, J.A. 356,

> understands that the school he would normally be assigned to would be all-minority school were it not for his own effort to leave that school. Further, it is often the case that the PWT minority child is accorded a second class status in the receiving school in that he is continually subject to the threat of having his attendance at that school discontinued for disciplinary reasons when that sanction would not be applied to the resident student. The PWT student, by his participation, is placed in a setting which is his not by right but by permission. The inequality of treatment of the minority child in that situation is clear.
>
> J.A. 345-46.

See also Exhibit II-363(14) (84 R.T. 12099) "Permits With Transportation: Additional Analysis and A Follow-up Report," Fourteenth Report of the [court-appointed] Monitoring Committee, February 28, 1980, pp. i-vi, pp. 74-90 (PWT program deprives minority schools of higher academically achieving students who display better relationships with teachers, stronger leadership qualities, and more positive self-images).

the trial court found that white non-participation was exacerbated by the Board's unequal treatment of the parents and children involved. J.A. 359. In the court's opinion, the Board's administration of the plan "led as much to the dissatisfaction of the white community with the board's desegregation plan as any single other factor. . . ." J.A. 358. 16/

16/ Nonetheless, the mandatory components of Plan II substantially reduced racial segregation at many minority schools. See the following comparison of enrollments in participating grades at certain minority schools under Plan II with estimated enrollments in the same grades at the same schools without Plan II:

SCHOOL	% MIN 1979-80	% MIN (if no mand. plan)	DIFF
Windsor Hills	59	99	40
Coliseum	63	100	37
Baldwin Hills	66	100	34
Cahuenga	56	90	34
San Fernando	66	98	32
Multnomah	67	99	32
Queen Anne	68	98	30

(continued)

Having determined that meaningful desegregation of Los Angeles' minority schools was not possible with an all-voluntary program, the court developed guidelines for a constitutionally-acceptable plan. J.A. 425, 433-51. It divided the district into eleven areas, and directed the Board to work with school, parent and community groups to form individual plans to desegregate minority schools in seven of the areas. 17/ J.A. 434, 436. The court

Braddock	59	89	30
Bushnell	56	85	29
Atwater	48	77	29
Park Western	55	83	28
Van Nuys	48	76	28
Haddon Ave.	61	87	26
Allesandro	64	86	22
Fenton	68	90	22

Source: Exhibits 11-C and 11-I, 4 R.T. 456.

17/ The guidelines provided that mandatory reassignments could not cross area boundaries, thereby limiting (continued)

left the Board free to devise its own plans, requiring only that mandatory techniques be used to desegregate not less than 85% of the involved schools in each area. J.A. 438-39.

But the Board resisted the remedial portions of the court's July 7 Order; it would submit no proposals that relied upon mandatory student assignment. The trial judge then entered a further remedial order on August 25, 1980, which defined the area plans to be implemented at the start of school. J.A. 499. The Court of Appeal later ordered modification of the trial court's plans,

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maximum travel times to between 20 and 25 minutes. The four areas excluded contained most of the minority segregated schools, among them the district's most severely segregated and inferior minority schools, and were located in the community's most identifiable black and Hispanic areas. See J.A. 431, 444.

reducing the number of areas where some desegregation would occur from seven to six, and replacing the trial court's multi-ethnic definition of a desegregated school with a definition requiring rough equivalence in numbers between whites and combined non-whites. J.A. 505.

The Board filed a petition with Justice Rehnquist to enjoin the mandatory portions of the court's program just before school began in September 1980. The petition was denied. [18] As with Plan II, the court's program affected only a very small proportion of the district's enrollment. [19]

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[18] See **Board of Education of City of Los Angeles v. Superior Court**, 488 U.S. 1343 (1980) (Rehnquist, J., Circuit Justice).

[19] The mandatory components (continued)

Both the Board and the petitioners [20] appealed the trial court's orders. The Court of Appeal bifurcated the appellate issues, separating Proposition 1 from the others. J.A. 543.

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involved only 153 schools (144 elementary; 9 junior high; 22% of the district's 685 schools), and only 57,649 students (21,517 white students, 36,132 minority students; less than 11% of the district's total enrollment of 534,712 students, 15% of the district's 127,281 white student population, and less than 9% of the district's minority student population). Excluded from the court's plan were over a quarter of a million minority students attending 264 minority segregated schools. Voluntary components of the plan involved about 30,000 students, 15,000 students in magnets, and 15,000 minority PWT participants. (Figures obtained from the District's Public Information Office, testimony of Theodore Alexander, Assistant Director of Integration Planning and Management, July 28, 1981 (R.T. 1090) and the 1980 Racial and Ethnic Survey.)

[20] Petitioners appealed inter alia from the trial court's exclusion from its desegregation plan of large geographic areas containing the district's most racially isolated and segregated schools.

On December 19, 1980, prior to completion of briefing on the non-Proposition 1 issues, the Court of Appeal issued its opinion reaffirming the Board's duty to desegregate the LAUSD schools under the state constitution and the **Crawford** I mandate, upholding the constitutionality of Proposition 1 on its face and as applied to this case, and vacating the trial court's orders of May 19 and July 7. [21] **Crawford v. Board of Education**, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980).

Petition for rehearing was denied by the court on January 14, 1981, and the

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[21] The Court of Appeal also held that the 1970 findings of the trial court were insufficient to support a holding of de jure segregation. **Crawford II**, 113 Cal.App.3d at 649, 170 Cal.Rptr. at 506.

California Supreme Court denied petitioners' petition for a hearing on March 11, 1981, Cert. Pet. 72A, 73A.

Shortly after the state Supreme Court's denial, on March 16, 1981, the Board voted 5-1 (with the only minority member, Rita Walters, in opposition) to permit students then assigned for desegregation to return to their neighborhood schools for the final nine weeks of the school year. Approximately 7,000 of the 23,000 students eligible to choose this option did so, and their return resulted in resegregation of some minority schools. At the beginning of the 1981-82 school year all mandatory reassignments had of course terminated, all minority schools that had been desegregated under the court's plan were resegregated, and other minority schools

whose levels of racial isolation had been substantially reduced returned to their prior levels of racial isolation. [22/] Several minority schools also

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[22/] According to Theodore Alexander, Assistant Director of the Integration Planning and Management Office, dismantlement of the mandatory components of the court's plan created 57 new minority segregated schools. R.T. 1091-92, July 28, 1981. Compare also the following percentages of minority students enrolled in minority schools under the court's 1980-81 plan and under the Board's 1981-82 plan:

School	1980-81 % Min. Actual Enr'lmt (Participating grades in court's mandatory plan)	1981-82 % Min. Actual Enr'lmt After Dismantling
O'Melveny	56	98
Windsor Hills	61	95
Baldwin Hills	66	100
Wilshire Crest	61	97
Camellia	54	85
Cahuenga	58	88
Roscoe	51	85
Fenton	60	92
Coliseum	71	94

(continued)

became overcrowded again because of the

Morningside	59	91
San Fernando	68	99
Noble	48	74
Hart	44	72
Haddon	70	98
Montague	61	90
Vaughn	74	99
Braddock	61	89
Barton Hill	69	93
Pacoima	76	99
Lankershim	55	80
Queen Anne	76	99
Osceola	55	83
54th Street	78	100
Sylvan Park	68	80
Park Western	64	68
Filmore	73	99
Hillcrest	80	100
Hawaiian	76	95
Telfair	80	98
Cienega	82	100
Virginia Road	81	98
Arminta	54	73
El Dorado	56	71
Sharp	77	93
Dayton Hts.	80	95
Cabrillo	55	77
Gridley	52	66
Arlington Hts.	87	99
Van Ness	63	80
Vine	83	85
Crescent Hts.	75	77
Playa Del Rey	69	72
Richland	73	71
Canfield	63	66

Source: LAUSD 1980-81 Racial and Ethnic
(continued)

return of students who had been assigned to other schools under the desegregation program.

On remand, the case was assigned to a new Superior Court judge. The Board filed another all-voluntary plan (Plan V), essentially identical to its prior submission. 23/ On September 10, 1981, the court held that the Board had satisfied the mandate "in light of the opinions" expressed by the Supreme Court in **Crawford I** and the Court of Appeal in

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Survey; LAUSD Preliminary Racial Ethnic Survey, Oct. 1981.

23/ The Board stated in papers filed with the court that Proposition 1 and **Crawford II** (the judgment now before this Court) prohibited court-ordering of mandatory reassignment absent a finding of a Fourteenth Amendment violation. See e.g., "Respondent's Statment of Issues Remaining To Be Decided," p. 2 (3/30/81); "Respondent Board of Education's Statement Of The Present Status Of The Case," p. 4 (5/4/81).

Crawford II, discharged the writ and retained jurisdiction of the case only for the purpose of awarding attorneys' fees. 24/ Petitioners filed a notice of appeal from this ruling on October 22, 1981 to the Court of Appeal.

The Board's voluntary plan went into effect with the start of school on September 15, 1981. 25/

24/ "Order Re Final Approval Of School Board Desegregation Plan And Discharge Of Writ Of Mandate," pp. 7-8.

25/ Percent minority enrollments at minority schools that participated in the court's 1980-81 plan are listed for fall, 1981 under the Board's plan in note 22, supra. As the following chart demonstrates, Plan V also failed to reduce the racial isolation of minority magnet campuses:

SCHOOL (Grades) Magnet Program	% MINORITY ENROLLMENT 1981-82
102nd Street (4-6) fund.	100
93rd Street (4-6) (continued)	100

Markham (7)	100
Dublin (1-6)	100
fund., car awar	
107th Street (4-6)	100
fund.	
Riggin (4-6)	96
bil/mult	
111th Street (4-6)	99
gifted	
Audubon (7-9)	99
gifted	
Drew (7-9)	100
Fremont (10-12)	100
math/sci	
Belvedere (7-9)	99
bil/mult	
El Sereno (4-9)	97
fund.	
El Sereno (7-9)	88
gifted	
Russell (1-6)	93
gifted	
Stevenson (7-9)	71
gifted	
Figueroa (1-6)	98
gifted	
Griffith (7-9)	88
math/sci	
Hillcrest CES (1-6)	81

(continued)

Peary (7-9) fund.	77
Filmore (4-6) fund.	66
Ambler (1-6) gifted	81
32nd Street (1-6)	73
Sierra Park (1-6) gifted	81
Amestoy (K-4)	64
Banning CIP	80
Dorsey CIP	100
Figueroa (1-6) gifted	98
Franklin CIP	79
Jordan Tech Occup.	99
Lincoln Med. Health	97
Manual Arts HCI	99
San Fernando CIP	81
Washington Com. Arts	100
Washington Math/sci.	100

SOURCE: Preliminary Racial Ethnic Survey, Oct. 1981

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FILED
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ALEXANDER L. STEVAS,

No. 81-38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD,
a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

RESPONDENT BUSTOP'S BRIEF

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QUESTION PRESENTED

Whether an amendment to the California Constitution which in effect prohibits a state court from ordering mandatory reassignment of students on the basis of race unless authorized and required by the United States Constitution while continuing to permit a school district from making such assignments itself violates the United States Constitution.

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No. 81-38

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a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

RESPONDENT BUSTOP'S BRIEF

STATEMENT OF THE CASE

This action was instituted in August 1963. In 1970, the trial court rendered judgment for petitioners.

In 1976, the California Supreme Court filed its opinion in this case, *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724 (1976), affirming the trial court's determination that the Los Angeles Unified School District was racially imbalanced and affirming the trial court's order that the Board propose and implement a reasonably feasible integration plan. The court reversed the trial court on the issue of defining segregated and integrated schools and remanded with instructions.

The opinion discussed various "techniques for facilitating the desegregation of school systems," 17 Cal.3d at 305, including pairing, magnet schools and satellite zoning. *Id.* and n. 17. The court indicated that it was well aware of the problems with mandatory pupil reassignment saying:

> "Although we have not specifically addressed the volatile issue of 'busing' in our discussion above, we believe that the general principles we have outlined are equally applicable to that matter. While critics have sometimes attempted to obscure the issue, court decisions time and time again have emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. (See, *e.g., Swann, supra,* 402 U.S. at p. 28 [28 L.Ed.2d at pp. 573-574]; *United States v. Texas Education Agency, supra,* 467 F.2d 848, 874.) (10) As with the numerous desegregation techniques adverted to above, in some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.* at 309.

By peremptory writ of mandate issued in *Bustop v. Superior Court*, 69 Cal.App.3d 66, 137 Cal.Rptr. 793

(1977), Bustop intervened in the case. Bustop is an organization devoted to voluntary integration, which has in excess of 100,000 supporters.

In the fall of 1970, under trial court supervision the Board proposed a desegregation plan including mandatory reassignment. J.A. 169. In the summer of 1978, Bustop obtained a writ of supersedeas staying the mandatory reassignment portions of the plan. The California Supreme Court vacated the writ, and Bustop's petition for stay was denied by Mr. Justice Rehnquist and on transfer by Mr. Justice Powell. ***Bustop, Inc. v. Board of Education***, 439 U.S. 1380 and 1384 (1978). The Board then began mandatory reassignment, which had the net effect of increasing racial imbalance. J.A. 547-549.

On November 6, 1979, California adopted the amendment to its constitution that is the subject of this action. The Board and Bustop applied to the trial court to modify its order based on the amendment. Petitioners' Brief at 24. The remainder of the procedural history of this action is set forth in Petitioners' Brief.

SUMMARY OF ARGUMENT

Proposition 1 prohibits the judicial assignment of students on a racial basis absent the requirement of such assignment in order to remedy a federal constitutional violation. In so doing, Proposition 1 merely restated federal law because the assignment by the state of students based on race was authorized only as a remedy to a federal constitutional violation. Absent a constitutional violation extensive pupil transportation based on race violates the rights of students and parents to be free from racial assignments and quotas given them by the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and other authority.

ARGUMENT

1. Proposition 1 Embraced Existing Federal Law Because Absent a Constitutional Violation School Assignments Based on Race Violate the Fourteenth Amendment.

The right of an individual to be free from state action that discriminates based on race is well known and has long been recognized by this Court. The right of an individual to be free from state action that impinges on the fundamental privacy right to educate one's children has also long been recognized by this Court.

In the area of school desegregation, the Court has allowed infringement of both these rights, but only where necessary to remedy a federal constitutional violation, simply because there was no other way to right the wrong, no other way to dismantle a "separate but equal" or a dual school system. But:

> "Absent a [federal] constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."
>
> ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 28 (1971).

It is undisputed that each desegregation plan proposed or implemented below used racial discrimination, quotas, preferences and classifications — and no other considerations — in allocating important educational benefits and burdens.

Without the limited exception available for the use of race in remedying a federal constitutional violation, such a system is absolutely void on two grounds, either of which is dispositive: First, the use of race as a sole criteria in decision making is absolutely void. Second, any governmental action impinging on a fundamental right or using a suspect classification must be examined using the strict scrutiny test which has not been done. Absent a federal constitutional violation, busing to racially balance public schools is at "best" an affirmative action program governed by ***Regents of the University of California v. Bakke***,

438 U.S. 265 (1978). In ***Bakke***, the Court voided the University's plan, saying:

> "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as *facially invalid*. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307 (emphasis added).

Since the various desegregation plans tried in Los Angeles all used race as their sole criteria to achieve a specific racial balance and used rigid racial quotas, no other result is possible under the Fourteenth Amendment, 42 U.S.C. § 1981, 42 U.S.C. § 1983, or 42 U.S.C. § 2000(d).

The University in ***Bakke*** used essentially the same reasoning to justify its plan as the Petitioners would use in justifying mandatory reassignment based on race to racially balance schools. The Court's answer to that contention is instructive:

> "The school desegregation cases are inapposite. Each involved remedies for clearly determined [federal] constitutional violations. *E.g.*, ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1 (1971); ***McDaniel v. Barresi***, 402 U.S. 39 (1971); ***Green v. County School***

> *Board*, 391 U.S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. *E.g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); see *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). *See also Austin Independent School District v. United States*, 429 U.S. 990, 991-995 (1976) (POWELL, J. concurring). *Here, there was no judicial determination of [federal] constitutional violation as a predicate for the formulation of a remedial classification.*"
>
> *Regents of the University of California v. Bakke, supra*, at 300 (note omitted) (emphasis added).

In declining our stay application in 1978, Mr. Justice Rehnquist rejected this line of reasoning saying the California Constitution had been construed "to require less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similiar relief under the United States Constitution." *Bustop, Inc. v. Board of Education*, 439 U.S. 1380, 1381 (1978). Mr. Justice Rehnquist went on to say that state courts are free to interpret state constitutions "to impose more stringent restrictions on the operation of a local school board." *Id.* at 1382. Mr. Justice Rehnquist rejected our argument "that each citizen of a State who is either a

parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy' " saying, "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that constitution to take such action." *Id.* at 1383.

We respectfully disagree. We will show below that this Court has indeed established just such rights. On an even more fundamental level, however, we ask the Court to consider the wisdom of a rule which would justify racial discrimination on the grounds that it serves a "higher" standard or on the grounds that its purpose, here the racial balance of public schools, is desirable.

Bakke teaches:

> "By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."
>
> 438 U.S. at 298-99.

As Mr. Justice Douglas observed:

> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality."
>
> ***DeFunis v. Odegaard***, 416 U.S. 312, 343 (1974) (dissenting opinion).

Mandating reassignment that is unrelated to a constitutional violation involves a lower standard than allowed by the federal Constitution for another reason: it places a stigma on minority students. The horror of the stigma of not allowing black students to attend school with white students was a prime moving force in ***Brown v. Board of Education***, 347 U.S. 483 (1954).

But a different, but clearly related, stigma is inherent here.

Again quoting Mr. Justice Douglas:

> "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any [person]."
>
> ***DeFunis v. Odegaard, supra***, at 343 (dissenting opinion).

2. The Use of Pupil Transportation Violates the Liberty and Privacy Rights Guaranteed by the Fourteenth Amendment.

Even in dismantling the most egregious case of a dual school system, the remedy must be carefully tailored to fit the wrong — for the remedy infringes on fundamental constitutional rights:

> " 'the task is to correct by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738, 41 L.Ed.2d 1069, 94 S.Ct. 3112 (1974), quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971).' "
>
> *Austin Independent School District v. United States*, 429 U.S. 990, 50 L.Ed.2d 603 (1976).
>
> "The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their

> children — especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather, upon innocent children and parents."
>
> *Id.* at n. 7, 50 L.Ed.2d at 605.

Absent a federal constitutional violation, there is nothing to balance against the rights of the family.

A child has the right to attend his neighborhood school — not a segregated school — but a neighborhood school open to all regardless of race. While this right is not spelled out in the Constitution, it is a fundamental right specified in a number of cases and proclaimed by eminent justices throughout this century.

Most recently, Mr. Justice Powell referred to these rights in ***Bakke***. In rejecting the University's claim that school desegregation cases supported its discrimination, the Court distinguished two lower court cases approving voluntary actions to eliminate racial imbalance where there was no federal violation.

> "In neither, however, was there any showing that the school board planned extensive *pupil*

> *transportation* that might threaten *liberty* or *privacy* interests."
>
> ***Regents of the University of California v. Bakke***, 438 U.S. 265, 300 n. 39 (1978) (emphasis added).

This was not an off-handed statement; it was based on, among other things, language in ***Keyes v. School District No. 1***, 413 U.S. 189, 244-48, 37 L.Ed.2d 548, 584-85 (1973) (POWELL, J. concurring in part and dissenting in part) (emphasis added) (citation omitted):

> "The refusal of the Court in *Swann* to require racial balance in schools throughout the district or *the arbitrary elimination of all 'one-race schools'* . . . is grounded in a recognition that the State, parents, and children all have at stake in school desegregation decrees, legitimate and recognizable interests.
>
> "*The personal interest might be characterized as the desire that children attend community schools near home.*"
>
> * * *
>
> "Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features

of the surrounding neighborhood. Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions — home, church, and school — which has caused a concomitant decline in the unity and communal spirit of our people . . ..

"Closely related to the concept of a community and neighborhood education, are those rights and duties parents have with respect to the education of their children. The law has long recognized the parental duty to nurture, support, and provide for the welfare of children, including their education. In ***Pierce v. Society of Sisters***, a unanimous Court held that: 'Under the doctrine of ***Meyer v. Nebraska***, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . .. ***The child is not the mere creature of the State***; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'

"And in ***Griswold v. Connecticut***, the Court noted that in ***Pierce***, 'the right to educate one's

children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments.' I do not believe recognition of this right can be confined solely to a parent's choice to send a child to public or private school . . . .

"*In the commendable national concern for alleviating public school segregation, courts may have overlooked the fact that the rights and interests of children affected by a desegregation program also are entitled to consideration.* Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy. Not long ago, James B. Conant wrote that '[a]t the elementary school level the issue seems clear. *To send young children day after day to distant schools by bus seems out of the question.*' "

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), cited above in *Keyes*, the Court struck down a Connecticut statute making the use of contraceptives a criminal offense, finding an unconstitutional invasion of the right of privacy.

In talking of the sanctity of the family and the rights involved in marriage the Court concluded:

"We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."

Id. at 486.

Concurring in *Griswold*, Mr. Justice Goldberg quoted Mr. Justice Brandeis, who said, albeit before his time:

> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . .. They conferred as against the Government, *the right to be let alone* — the most comprehensive of rights and the most valued by civilized men.' "
>
> *Id.* at 494 (emphasis added).

Mr. Justice Harlan stated, dissenting in *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961):

> "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

In *Roe v. Wade*, 410 U.S. 113 (1973), striking down a Texas criminal anti-abortion statute, Mr. Justice Blackman, speaking for the Court, reiterated that while the Constitution does not explicitly mention any right of privacy, "zones of privacy" have been recognized under the First, Fourth, Fifth, and Ninth Amendments. Indeed, "in the penumbras of the Bill of Rights." *Id.* at 152. He further recognized that the right or zones of privacy are inherent in

"the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Id.*

In concurring in *Roe v. Wade*, Mr. Justice Douglas said many rights come within the meaning of liberty as under the Fourteenth Amendment:

> "*First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*"
>
> * * *
>
> "*Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children . . ..*
>
> "These rights are 'fundamental,' and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a 'compelling state interest' must be shown in support of the limitation."
>
> * * *
>
> "*Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.*"
>
> 410 U.S. at 211-13 (emphasis in original).

Mr. Justice Frankfurter, concurring in *May v. Anderson*, 345 U.S. 528, 536 (1953), noted that "children have a very special place in life which the law should reflect."

In *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), a statute that deprived an unwed father of custody was voided. Mr. Justice White carefully described the protected interest of the family:

> "The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect' . . ..
>
> "The Court has frequently emphasized the importance of the family . . .. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' "
>
> *Id.* at 651.

These rights are clearly infringed by the government's taking children away from their neighborhood school and putting them in buses for hours each day as a prerequisite to receiving a public education. Proposition 1 merely codified these principles. In a sense, it was unnecessay because it was redundant.

3. Federal Statutes Prohibit Busing and School Assignments Based on Race. Any California Law That Authorized Such Activities, Would Conflict with Federal Statutes and Must Fall Under the Supremacy Clause.

> "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. *Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'* "
>
> ***Jones v. Rath Packing Co.***, 430 U.S. 519, 525-26 (1977) (emphasis added).

In ***Jones v. Rath***, the Supreme Court invalidated a California law merely because it conflicted with one of the purposes of the federal statute in question, in spite of a specific finding that it was possible to comply with both federal and California law. *Id.* at 540.

Insofar as California law is interpreted as requiring or permitting busing without a federal constitutional violation, such action runs afoul of the Supremacy Clause, as it would "stand as an obstacle to the full purposes and objectives of Congress" in enacting a number of statutes, particularly the Equal Educational Opportunities Act of 1974, 20 U.S.C.A. §§ 1701 et seq. (1978).

Congressional legislation has clearly demonstrated an intent and purpose to eliminate all discrimination based on race in public education; to support the existence of the neighborhood school; and to eliminate forced busing.

Section 202 of Title II of the Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 (1978), states:

> "Congressional declaration of policy
>
> "(a) *The Congress declares it to be the policy of the United States that —*
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) *the neighborhood is the appropriate basis for determining public school assignments.*"
>
> (Emphasis added.)

Just as Justice Powell, in footnote 39 in ***Bakke***, drew a distinction where "the school board planned extensive

pupil transportation," the legislative history of the Equal Educational Opportunities Act showed tremendous hostility, not to integration, but to pupil transportation.

In introducing his Amendment, Congressman Esch, the bill's author, said:

> "[W]hat we have before us today is an amendment that has been very carefully drawn to resolve the issue of constitutionality involved in the proposition that every child should be educated to his fullest extent possible that child should also be educated in a neighborhood school . . .. [I]t would clarify the intent of this Congress to reemphasize education in neighborhood schools . . .."
>
> * * *
>
> "I think that the people . . . in the inner cities and suburbs throughout the country are tired of this threat of cross-country busing and they, like many Americans, both black and white, are tired of having their children used in a poorly thought out social experimentation. I do not blame them and I urge the Congress to adopt this amendment."
>
> Congressional Record — House, March 26, 1974, H 2161.

Further elaboration on the purposes of the Esch Amendment is shown by the statements of one of the bill's sponsors, Congressmen O'Hara:

> "Racially selective schoolbusing was wrong when it was used to perpetuate dual school systems. Racially selective schoolbusing is wrong when it is used in the name of 'desegregation' with the goal of meeting racial quotas in given schools or school districts." *Id.*

The principle purpose behind the Esch Amendment was concisely stated by Congressman Milford who said:

> "The issue is the forced busing of students. Time and time again surveys and polls show that the people of this Nation do not want their children going to school outside their own neighborhood.
>
> "This amendment puts a stop to the practice.
>
> * * *
>
> "The transportation solution to racial imbalance in the schools perhaps has solved a statistical problem. But it has ill-served its ultimate goal — the achievement of good will among Americans of different race.
>
> "Mr. Chairman, I sincerely hope that this amendment is not tagged as 'anti-integration,' because I favor racial integration as much as any

> member of this body. We have open housing laws, and, I believe we should push harder to make job training and jobs available so that families can afford to change neighborhoods if they wish, instead of moving children around like pawns in some kind of statistical game."
>
> *Id.* at 2164.

One cannot read Congressman Milford's remarks without thinking they seem specifically aimed at the proceedings in the instant case.

An examination of the legislative history of the Equal Educational Opportunities Act of 1974 demonstrates that the major purposes for this congressional enactment, indeed its *raison d'etre*, was to preserve the neighborhood school and prevent forced busing and school assignments based on race where they were not required under the federal Constitution. Proposition 1 embraces this statute as interpreted.

The California Equal Protection Clause, as interpreted by the California Supreme Court in *Crawford*, and as "interpreted and applied" prior to Proposition 1, stood as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

CONCLUSION

Proposition 1's sole purpose and effect was to bring California law in line with federal law which neither authorized nor permitted pupil transportation based on race unless necessary to remedy a federal constitutional violation.

Respectfully submitted,

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No. 81-38
IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

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QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment invalidate a state constitutional amendment which conforms state court use of mandatory student assignment and transportation to that authorized for federal courts under the Fourteenth Amendment?

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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, etc., *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

On November 6, 1979, the Equal Protection Clause of the California Constitution was amended by Proposition 1 to provide in relevant part that

> "nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation."[1]

This Court has approved the use of court-ordered reassignment of students, but it has done so only where that remedy is used to break down an established system of de

[1]The full text of article I, section 7(a) is printed at pages A1-A2 *infra*.

jure segregation in which the Fourteenth Amendment rights of minority schoolchildren were violated. *E.g., Columbus Board of Education v. Penick*, 443 U.S. 449, 464 (1979); *Swann v. Board of Education*, 402 U.S. 1, 22-23 (1971). The Court has held that there is no federal constitutional duty to use mandatory student reassignment or other desegregation remedies to correct de facto segregation resulting from housing patterns or other demographic factors beyond the control of a school district. *E.g., Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977) (*Dayton I*); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*).

Proposition 1 incorporates all of these decisions as the governing standard in school desegregation cases based upon the California Constitution. In order to require the assignment or transportation of students, a California state court, like a federal court, must find de jure segregation in violation of the Fourteenth Amendment.

I.
PROCEEDINGS IN THE TRIAL COURT.

This case was filed on August 12, 1963, several weeks after the California Supreme Court stated in dictum in *Jackson v. Pasadena City School District*, 59 Cal.2d 876, 382 P.2d 878, 31 Cal.Rptr. 606 (1963), that the Equal Protection Clause of the California Constitution required school districts to remedy de facto segregation in their schools. It was filed as a class action against the Board of Education of the City of Los Angeles, the governing body of the Los Angeles Unified School District ("the District"). Petitioners purport

to represent all minority students attending the District's schools. Cert. Petition ii.[2]

On May 12, 1970, the trial court (Superior Court Judge Alfred T. Gitelson) entered a judgment and writ of mandate which required the District to prepare a plan for the desegregation of its schools. J.A. 139. Following an appeal by the District, the California Supreme Court affirmed with modification and remanded with instructions to the District to take "reasonably feasible steps to alleviate segregation and its accompanying harms." *Crawford v. Board of Education*, 17 Cal.3d 280, 286, 551 P.2d 28, 130 Cal.Rptr. 724 (1976) *(Crawford I)*. The court stated in dictum that the trial court's findings adequately supported the conclusion that segregation in the District was de jure in nature, but it expressly did not rest its decision on that characterization. 17 Cal.3d at 285. Instead, the court reaffirmed its dictum in *Jackson* and held that there was an "obligation under the State Constitution" to undertake reasonably feasible steps to alleviate school segregation "whether the segregation be de facto or de jure in origin." 17 Cal.3d at 290 and 301. Because the California Supreme Court's decision was based upon its construction of the California Constitution, the District did not seek review before this Court.

Following remand, the trial court (Superior Court Judge Paul Egly) commenced renewed proceedings in February 1977. On March 18, 1977, the District submitted its first desegregation plan, which included mandatory reassignment of students on a limited basis. After a three-month trial, the

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[2]Throughout this brief we will cite to the Joint Appendix ("J.A."), the Petition for Certiorari ("Cert. Petition"), the Clerk's Transcript from the trial court ("C.T."), and the appendix of testimony and exhibits filed by the District in the Court of Appeal ("Dist. App."). All C.T. and Dist. App. references are contained in the certified record from the Court of Appeal.

trial court on July 5, 1977, rejected the plan and ordered the District to return a new plan within ninety days, after examining "all reasonable alternative plans." J.A. 139, 162.

The District did not appeal the trial court's rejection of its first plan, but instead returned a new plan ("Plan 2") on October 3, 1977, within the ninety-day period specified by the court. Following hearings, the trial court entered an interlocutory minute order which approved implementation of Plan 2 beginning in September 1978, subject to later reexamination and modification. J.A. 169. The court's minute order described Plan 2 as "an important initial step toward eventual compliance with the writ of mandate." J.A. 173.

During the summer of 1978, intervenor Bustop moved to stay implementation of Plan 2, contending that the plan violated the constitutional rights of schoolchildren. The trial court denied the motion, but the Court of Appeal granted a stay incident to Bustop's appeal. The California Supreme Court vacated the stay and Justices Rehnquist and Powell each refused to intervene pending review by this Court. *Bustop, Inc. v. Los Angeles Board of Education*, 439 U.S. 1380, 1384 (1978).

Plan 2 commenced operation on September 12, 1978. By providing for mandatory reassignment of approximately 40,000 students attending grades 4 through 8 of every school with a white enrollment over 70% (except one, which is geographically isolated), it was one of the nation's most extensive plans of mandatory student reassignment. *See generally*, C.T. 2730-5314. Plan 2 also provided for the voluntary transfer of over 30,000 students through the creation of magnet schools and permits with transportation (PWT), an optional transfer program. *Id.*

In March 1979 the District filed with the trial court a comprehensive analysis of the first semester performance of Plan 2. Because of the plan's failure to desegregate, due in large part to unprecedented losses of white students, the District recommended no further additions to the mandatory reassignment component and instead proposed expansion of the voluntary programs. C.T. 9830-11531.

By fall 1979, all parties wanted Plan 2 discontinued. On October 22, 1979, the trial court commenced renewed hearings to consider alternatives to Plan 2. The District submitted an all-voluntary desegregation plan which proposed to expand the existing magnet program and PWT program to include a combined total of 50,000 students, develop 16 educational complexes containing 189 schools and 154,000 students, and expand special programs for predominantly minority schools. C.T. 13598-820. Petitioners and most other parties outlined their own desegregation approaches, but only the District presented a specific desegregation plan.

On November 6, 1979, fifteen days after the trial began, the people of California approved Proposition 1 by more than a two-to-one margin.[3] It became effective the day following its enactment. *See* Cal. Const. art. IV, § 24(a).

Proposition 1 amended the Equal Protection Clause of the California Constitution, article I, section 7(a), to prohibit state courts from ordering mandatory student assignment or transportation unless necessary to remedy a specific viola-

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[3]The official vote was 2,433,312 (68.6%) in favor and 1,112,923 (31.4%) against. California Secretary of State, *Statement of the Vote, Nov. 6, 1979 Election*, 4. Prior to the November 6 election, Proposition 1 was passed in the State Senate by a vote of 28 to 6 and in the State Assembly by a vote of 62 to 17. J.A. 258. Proposition 1 was a compulsory referendum on a legislative constitutional amendment. Under the California Constitution an amendment may be proposed by initiative or by the legislature, and it must be approved by a majority of the electorate. Cal. Const. art. XVIII.

tion of the Fourteenth Amendment. On November 15, 1979, the District applied, pursuant to article I, section 7(a), to modify the trial court's interlocutory minute orders concerning Plan 2 and to "hold a hearing to determine whether a federal court, sitting today, would find a de jure violation and impose a remedy involving pupil school assignment or pupil transportation." J.A. 185, 189. Although the parties filed extensive briefs on Proposition 1, the trial court deferred ruling on the District's application until the completion of the pending trial, and Plan 2 remained in operation.

The trial ended on April 11, 1980, after 25 weeks of testimony, 12,000 pages of reporter's transcript, and 450 exhibits. On May 19, 1980, the trial court entered a minute order denying the District's application under article I, section 7(a) of the California Constitution. Cert. Petition 76A. On July 7, 1980, the trial court signed without alteration an eight-page set of findings of fact and conclusions of law petitioners had proposed for the May 19 minute order. Cert. Petition 81A. Neither the trial court's minute order nor the findings of fact ruled upon the constitutionality of Proposition 1. Instead the court held that the findings of fact entered by Judge Gitelson in 1970 established de jure segregation in violation of the Fourteenth Amendment and that the constitutional question was therefore moot. *Id.* at 90A-93A. Despite the voluminous evidence received in the recently completed six-month trial, the trial court's conclusion about de jure segregation was based entirely upon Judge Gitelson's ten-year-old findings. *Id.* at 84A-90A.

On July 7, 1980, the trial court also entered an order, findings of fact and conclusions of law, which rejected the District's voluntary desegregation plan and ordered a new plan ("Plan 3") based on extensive mandatory reassignment of students. J.A. 315-480. All parties filed objections to Plan 3 and all appealed the trial court's July 7 order. C.T.

17159-410 and 17643-720. On July 10, 1980, the trial court, notwithstanding the parties' appeals, ordered immediate implementation of Plan 3 pursuant to California Code of Civil Procedure § 1110b. C.T. 17550.

Although both the California Court of Appeal and the California Supreme Court declined to vacate the trial court's July 7 order by extraordinary writ of mandamus, the trial court's desegregation plan was modified by two stay orders issued by the Court of Appeal during the summer of 1980. J.A. 481 and 505. The principal effects of the stay orders were to prevent the use of an extremely complex multiethnic racial balance reassignment formula, to require the exclusion of naturally desegregated schools from mandatory reassignment, and to prohibit drastic cutbacks in the voluntary magnet and PWT programs. *Id.* On September 12, 1980, Justice Rehnquist denied the District's application to stay Plan 3 and the trial court's July 7 order pending review by this Court. *Board of Education of Los Angeles v. Superior Court*, 448 U.S. 1343 (1980).

The District commenced the 1980 school year on September 16, 1980, under Plan 3, as modified by the Court of Appeal's stay orders. Plan 3 remained in operation through April 10, 1981.

II.
PROCEEDINGS IN THE COURT OF APPEAL.

On July 10, 1980, the District filed two notices of appeal: the first concerning the trial court's order of May 19, 1980, regarding Proposition 1, and the second concerning the order of July 7, 1980, regarding Plan 3. All other parties, including petitioners, also appealed from the trial court's July 7 order. C.T. 17643-720.

The California Court of Appeal expedited briefing upon the suggestion of the state Supreme Court. J.A. 539. Be-

cause of the extraordinary length of the trial court record and delays in its preparation, the Court of Appeal ordered the parties to prepare appendices of testimony and exhibits in conformity with Federal Rule of Appellate Procedure 30. J.A. 540-41. On October 8, 1980, the Court of Appeal, with no objection by petitioners, bifurcated the appeal from the May 19 order concerning Proposition 1 and the appeal from the July 7 order. J.A. 543. The court heard argument on the Proposition 1 appeal on December 8 and filed its unanimous opinion on December 19, 1980. *Crawford v. Board of Education*, 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) (*Crawford II*).

The Court of Appeal's opinion first examined the trial court record to determine whether there was any evidence of de jure segregation within the District. Because the trial court's May 19 and July 7 orders relied exclusively on the findings of fact entered in May 1970 by Judge Gitelson, the court focused on those findings. The Court of Appeal concluded that the 1970 findings of fact and conclusions of law were based on the incorrect view that the Fourteenth Amendment required the District to eliminate racial imbalance, regardless of its cause, and that passive maintenance of a neighborhood school system in the face of residential segregation amounted to a de jure violation. 113 Cal.App.3d at 644-46. The court did not alter the 1970 findings or engage in its own fact finding, but held that the trial court's conclusions of law about de jure segregation were erroneous as a matter of law and inconsistent with this Court's decisions under the Fourteenth Amendment. 113 Cal.App.3d at 649-50.

Having found no Fourteenth Amendment violation that would independently justify Plan 3, the Court of Appeal next examined the constitutionality of Proposition 1. The court traced the school desegregation decisions of this Court

and the California Supreme Court, noting that the California courts had construed the state constitution more broadly than the Federal Constitution in requiring school districts to alleviate de facto segregation. 113 Cal.App.3d at 650-51. Examining Proposition 1, the court held that its purpose and effect were to conform the California Constitution to the Federal Constitution by limiting the power of state courts to require student assignment and transportation as a remedy for de facto segregation. 113 Cal.App.3d at 651-52. The court further held that Proposition 1 did not violate petitioners' rights under the Fourteenth Amendment, was not enacted with discriminatory intent, and did not deprive petitioners of any vested or adjudicated rights. 113 Cal.App.3d at 652-56.

Having held Proposition 1 to be constitutional and that the trial court's May 19 and July 7 orders violated Proposition 1 because the record did not contain evidence of intentional de jure segregation, the Court of Appeal vacated the trial court's orders and remanded the case for further proceedings. 113 Cal.App.3d at 656-57. On December 23, 1980, the court issued an order dismissing as moot all remaining appeals from the trial court's orders.

Following an unsuccessful petition for rehearing in the Court of Appeal, petitioners filed a petition for hearing in the California Supreme Court. Their petition was denied on March 11, 1981, with only Chief Justice Bird dissenting. Cert. Petition 73A; 170 Cal.Rptr. at 510. The Court of Appeal's decision became final under state law on March 11 when the California Supreme Court's ruling was filed. *See* Cal. Rules of Ct. 24 and 25. Petitioners did not apply to this Court or the Circuit Justice for a stay of the Court of Appeal's decision.

III.
RECENT PROCEEDINGS IN THE TRIAL COURT.

The Court of Appeal's remittitur was filed in the trial court on March 12, 1981. Cert. Petition 74A. On March 16, 1981, the Board of Education adopted a resolution which gave parents of students mandatorily reassigned under Plan 3 the option of returning their children to neighborhood schools or remaining in mandatory reassignment beginning on April 20, 1981, the first day of the fourth academic quarter. Petitioners filed a motion for a preliminary injunction in the trial court, which was denied by the Presiding Judge of the Superior Court. The Court of Appeal and the California Supreme Court each denied review of the trial court's ruling.[4]

On April 20, 1981, over 7,000 students (4,300 of whom were minority students) elected to end their participation in mandatory reassignment and return to their neighborhood schools. All of the approximately 16,000 students remaining in paired and clustered schools through the end of the 1980-81 school term did so on a voluntary basis.

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[4]After the state courts had denied the injunction, one group of petitioners' attorneys filed a new action in the United States District Court for the Central District of California. On April 17, 1981, the District Court issued a temporary restraining order prohibiting implementation of the Board of Education's resolution. *Los Angeles NAACP v. Los Angeles Unified School Dist.*, 513 F.Supp. 717 (C.D. Cal. 1981). That order was vacated by the Ninth Circuit Court of Appeals in an extraordinary session on the following day, April 18. 650 F.2d 1004 (9th Cir. 1981). On Easter Sunday, April 19, the federal plaintiffs filed an application with Justice Rehnquist, as Circuit Justice, to stay the order of the Court of Appeals. Their application was withdrawn on Monday, April 20. (*See* No. A-875.) Since that time, the District Court has denied the District's motion to dismiss the case on the grounds of abstention and res judicata, but that ruling is now on appeal pursuant to 28 U.S.C. § 1292(b). The trial court also denied a motion by the District to stay the trial court proceedings pending this Court's decision in *Crawford*. The District has filed a motion in the Ninth Circuit Court of Appeals to stay the trial court proceedings, and that motion is currently under submission.

Judge Paul Egly recused himself from further proceedings in this case on March 16, 1981. Superior Court Judge Robert B. Lopez became the new trial judge on April 17, 1981. During the past summer, Judge Lopez conducted a trial to determine a new desegregation plan for the 1981-82 school term. The District submitted an all-voluntary desegregation plan ("Plan 4"), which was substantially similar to the plan it had proposed in the 1979-80 trial. Petitioners and other parties again presented their own desegregation approaches.

Judge Lopez entered an order on September 10, 1981, following completion of the trial.[5] The order held that Plan 4 satisfied the mandate of *Crawford I* and *Crawford II*, and it granted final approval for implementation of the plan and terminated the court's jurisdiction over all further matters except determination of attorneys' fees and costs.[6] Petitioners have filed a notice of appeal from the September 10 order.

On September 15, 1981, the District commenced the 1981-82 school year under Plan 4, which is presently in operation.

IV.
DESCRIPTION OF THE DISTRICT.

The Los Angeles Unified School District is the nation's largest urban school district with boundaries encompassing 635 schools scattered throughout 710 square miles. J.A. 363-65. In contrast to the densely populated central cities of the East and Northeast, the metropolitan Los Angeles

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[5]A certified copy of Judge Lopez's order has been lodged with the Clerk and is printed at pages A3-A8 *infra*. The District has supplied the order in recognition of its duty to notify the Court of relevant and important developments in the case. *See Fusari v. Steinberg*, 419 U.S. 379, 390 (1975).

[6]Judge Lopez has since entered an order regarding costs and attorneys' fees and has terminated the court's jurisdiction entirely.

area has grown through an amalgamation of suburban communities. The District serves not only the 464 square miles of the City of Los Angeles but also the seven separate cities of Cudahy, Gardena, Huntington Park, Lomita, Maywood, Vernon and San Fernando. In addition, portions of 18 other cities, as well as unincorporated county areas, fall within the District's boundaries. *Id.* It is more than 58 miles from the southern tip of the District in San Pedro to its northwestern boundary in Chatsworth, and from its western to eastern boundaries the District stretches for 30 miles. The sheer size of the District is so great that the Boston, San Francisco, Pittsburgh, Cleveland, Denver and Dayton school districts could be contained within its boundaries simultaneously with room to spare. *Id.*

The Santa Monica Mountains, which extend east to west from the San Gabriel Valley to the Pacific Ocean, completely separate the San Fernando Valley from the more central areas of Los Angeles. In 1979 approximately 70% of all white students in the District resided north of the mountains in the San Fernando Valley. *Id.* Travel between the Valley and the city is limited primarily to three heavily-traveled routes: the Hollywood, Golden State and San Diego Freeways. Two of the Freeways (the Hollywood and Golden State) pass through the congested downtown area of Los Angeles, while the San Diego Freeway is the principal connector between the western portions of the city and the San Fernando Valley. *Id.* Judge Egly found that the great distances and far-flung distribution of the various racial and ethnic groups result in little natural connection between areas, and that the prognosis for desegregation within the District "can fairly be described as being partly the prisoner of the District's geography. . . ." J.A. 364-65.

Over 540,000 students are enrolled in the District, making it the second most populous school district in the nation.

In the past decade the District has experienced dramatic demographic change. In 1966, the District's first racial and ethnic survey of its schools showed a total pupil enrollment of 627,219, of which 351,817 (56.1%) were white, 133,976 (21.4%) were black, 116,531 (18.6%) were Hispanic, and 24,134 (3.9%) were Asian. J.A. 370. Today the enrollment is 543,467, which is composed of 122,526 (22.5%) white, 120,543 (22.2%) black, 257,570 (47.4%) Hispanic, and 40,765 (7.5%) Asian. Los Angeles Unified School District, *October 1981 Ethnic Analysis* 721.[7]

As shown by the following table, the distinctive feature of the District's demography over the past sixteen years has been a rapid decline in white students and an equally rapid increase in Hispanic students.[8]

District Racial and Ethnic Enrollment, 1966-1981

Grades Kindergarten Through 12

	% White	% Black	% Hispanic	% Asian
1966	56.1	21.4	18.6	3.8
1967	54.6	22.0	19.4	3.9
1968	53.7	22.6	20.0	3.6
1969	51.6	23.4	20.8	4.0
1970	49.9	24.1	21.8	4.1
1971	47.7	24.8	22.7	4.6
1972	46.0	25.2	23.9	4.7
1973	44.4	25.3	25.6	4.5

[7]In grades kindergarten through 3 the enrollment is now 15.5% white, 18.2% black, 59.5% Hispanic, and 6.6% Asian. *Id.*

[8]Petitioners have cited statistics showing the admittedly large number of predominantly minority schools within the District. However, they have failed to mention that virtually all of the District's white students presently attend integrated schools. As of October 1981, only four of the District's 635 schools had enrollments more than 70% white. Those schools are Topanga elementary (90.09% white), Anchorage elementary (80.39% white), Crestwood elementary (74.19% white), and Superior elementary (71.71% white). Topanga elementary is geographically isolated in the remote Topanga Canyon area of the San Fernando Valley, and Anchorage elementary is scheduled to be closed soon because of its dwindling enrollment. (Compiled from *October 1981 Ethnic Analysis.*)

	% White	% Black	% Hispanic	% Asian
1974	41.9	24.7	27.8	5.1
1975	40.2	24.5	29.7	5.1
1976	37.0	24.1	32.1	5.9
1977	33.7	24.7	34.9	6.1
1978	29.7	24.6	35.5	6.5
1979	27.0	24.1	41.8	6.7
1980	23.7	23.3	45.3	7.3
1981	22.5	22.2	47.4	7.5

Trial Exhibit 29, Dist. App. 920 (updated with current enrollment data).

The District's changing enrollment patterns have been severely aggravated by the unprecedented loss of white students caused by the implementation of compulsory student reassignment during the pendency of the trial court remedy proceedings. Between October 1976 and October 1980, the District has seen its white student enrollment decline from 219,359 to 125,654 — a loss of 93,705 students. In only four years the District has lost 42.7% of its white student enrollment. Compare J.A. 547 and 548.

The District's demographic picture, particularly when coupled with its enormous area and complex geography, caused Judge Egly to find: "That district-wide desegregation . . . is impossible to achieve by reasonably feasible means because of distances, ratios between white and minority children and propensities to white flight." J.A. 462.

SUMMARY OF ARGUMENT

In *Crawford I*, the California Supreme Court declared that local school districts are obligated to take reasonable and feasible steps to alleviate de facto segregation. The court's decision rested squarely on the California Constitution, which it construed as granting desegregation rights and remedies more expansive than those under the Federal Constitution.

Proposition 1 brings one aspect of this judicially-created state law into conformity with the Federal Constitution: state courts may now order the assignment or transportation of students only if the facts establish a violation of the Fourteenth Amendment. In so doing, Proposition 1 does not create a barrier to effective school desegregation, as petitioners contend. Quite to the contrary, it permits local school districts to adopt any school desegregation remedy, including mandatory student reassignment; it permits state courts to order remedies other than mandatory reassignment to correct de facto segregation; and it permits state courts to include mandatory reassignment in a desegregation order if a Fourteenth Amendment violation is found. Even as amended by Proposition 1, the California Constitution provides desegregation rights and remedies considerably broader than those under the Federal Constitution.

Proposition 1 modifies the remedy applicable to state-created rights; it does not reduce or interfere to any extent with rights or remedies guaranteed by the Federal Constitution. The California state courts have upheld enactments such as Proposition 1, reaffirming the people's right to modify judicially-created state law through initiative and referendum. Recent decisions by this Court recognize that the creation or modification of state constitutional rights falls within the state's prerogative and will be held to violate the Federal Constitution only when federally-protected rights are impaired. Proposition 1 expressly preserves all federally-protected rights, because the remedy of mandatory reassignment is made available in all circumstances where the Federal Constitution requires its use. The approach advocated by petitioners, which would permit states to expand but not contract state-created rights, would require an unprecedented construction of the Fourteenth Amendment and

would seriously impair the dynamic functioning of state constitutional law.

Proposition 1 does not apply just to desegregation cases, and it does not contain a racial classification. It places limitations on the use of mandatory student reassignment, a severe remedy with unique burdens, but it does not divide the citizens of California into racially-identifiable groups. Courts which have reviewed the constitutionality of Proposition 1 and similar enactments have rejected the argument that a racial classification exists. The decisions of this Court relied upon by petitioners do not support their argument because the cases each involved enactments which placed special burdens on a discrete racial group. Proposition 1, which specifically embraces the Fourteenth Amendment and which ensures that school desegregation plaintiffs will continue to have state constitutional rights broader than those under the Federal Constitution, does not place burdens on anyone.

Petitioners contend that Proposition 1 has an unconstitutional purpose and effect, but there is no such finding in the record below. Indeed, the Court of Appeal reviewed the same arguments and materials that petitioners have presented in this Court and it specifically held that Proposition 1 does not have an improper purpose or effect. Given the deference that *Reitman v. Mulkey*, 387 U.S. 369 (1967), requires, the Court of Appeal's holding, which is fully supported by the record and decisions of this Court, is unassailable. Petitioners' arguments about racially discriminatory purpose are based on newspaper clippings, campaign literature and other inadmissible materials which were never introduced in evidence or judicially noticed by the trial court. Even those materials, however, show that Proposition 1 was motivated by factors other than race, and the official election returns for Proposition 1 demonstrate that it re-

ceived widespread support from all racial and ethnic groups throughout the state.

Finally, petitioners' brief includes a lengthy "special appendix" which indirectly raises several arguments about the existence of de jure segregation, the impairment of "vested" or adjudicated rights to the remedy of mandatory rassignment, and the effectiveness of mandatory student reassignment under earlier desegregation plans within the District. In the main, these arguments relate to questions not presented to this Court, are contrary to the record, and do not detract at all from the validity of the ruling below.

ARGUMENT

I.

PROPOSITION 1 CONFORMS STATE COURT USE OF MANDATORY REASSIGNMENT TO THE REQUIREMENTS OF THE FOURTEENTH AMENDMENT; IT DOES NOT PROHIBIT THAT REMEDY.

Petitioners have greatly exaggerated the effect of Proposition 1. They claim that it creates a "barrier" to school desegregation, it "removes" the remedy of mandatory reassignment, and it interposes "major obstacles" to the rights of school desegregation plaintiffs. (Br. at 36 and 42.) All of this might lead one to believe that Proposition 1 sounds a death knell for school desegregation in California and that no state court or local school board may ever again order mandatory reassignment of students.

Proposition 1 does none of these things. As the Court of Appeal held, in desegregation cases Proposition 1 does nothing more than conform the California Constitution to the Federal Constitution in the power of a state court to order mandatory student assignment or transportation as a remedy for nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651. Proposition 1 provides in relevant part:

> "In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal

Protection Clause of the 14th Amendment of the United States Constitution."

Proposition 1 thus does not create a "barrier" to school desegregation or "remove" the remedy of mandatory assignment or transportation of students. It specifically incorporates the requirements of the Fourteenth Amendment as the governing standard. The tools of mandatory assignment or transportation may still be ordered so long as a California state court finds a violation of the Fourteenth Amendment. Moreover, Proposition 1 does not create "obstacles" for school desegregation plaintiffs any more than the Fourteenth Amendment itself. The standard of proof for establishing a right to mandatory reassignment or transportation is identical to the standard under the Federal Constitution. The error of petitioners' argument is illuminated by one indisputable fact: For years federal courts have ordered mandatory reassignment where that remedy is appropriate. Proposition 1 permits state courts to do the same.

As amended by Proposition 1, the California Equal Protection Clause now provides three levels of school desegregation remedies. First, a local school board may adopt any school desegregation remedy, including mandatory reassignment. *Crawford II*, 113 Cal.App.3d at 651. That power is expressly reserved by Proposition 1, which states: "nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan."

Second, a California court may order remedies other than mandatory reassignment of students to correct nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651-52. For example, a court may order a school board to implement many of the programs specifically mentioned in *Crawford I*, 17 Cal.3d at 305, such as magnet schools, voluntary student transfers, teacher and

staff reassignments, improvements in physical facilities, and enriched educational curricula.[9] This Court has endorsed and noted the effectiveness of some of these techniques. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25-26 (1971) (voluntary transfer programs); *Milliken v. Bradley*, 433 U.S. 267, 279-88 (1977) (*Milliken II*) (compensatory education programs).

Finally, a California court may include mandatory reassignment of students in a desegregation order if the evidence establishes a Fourteenth Amendment violation. *Crawford II*, 113 Cal.App.3d at 652. In ordering that remedy, a California court has powers identical to those of a federal court operating under the same facts and circumstances.

Because Proposition 1 does not foreclose mandatory reassignment as a remedy and leaves other effective remedies unchanged, this case is similar to *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980). That case involved the constitutionality of congressional appropriation bills which prohibited the Department of Health, Education and Welfare from requiring mandatory student reassignment as a condition to receiving federal educational funds.[10] The District Court upheld the enactments' constitutionality because their provisions, like those of Proposition 1, do not prohibit mandatory reassignment but simply remove one setting in which it can be used. 455 F.Supp. 837, 841 (D.D.C. 1978).

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[9]As a concrete example of the power permitted by Proposition 1, Judge Lopez has ordered the District to supplement its desegregation plan by locating new magnet schools in minority neighborhoods, maintaining a lower student-teacher ratio in predominantly minority schools, and permitting all interested minority students to participate in the PWT program. Sept. 10, 1981, Order, *infra* at A7

[10]Proposition 1 is even less restrictive than the amendments upheld in *Brown v. Califano*. In contrast to the prohibition against HEW-ordered busing enacted by Congress, Proposition 1 permits California law to be dynamic by incorporating federal decisional law. Thus, as federal law in this area changes, so too will California law.

On appeal, plaintiffs argued that the provisions were unconstitutional because they hampered HEW's efforts to desegregate schools and therefore impermissibly involved the federal government in the preservation of school segregation, and because the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Court of Appeals, in a unanimous opinion by Judge Bazelon, rejected both arguments and affirmed the trial court's ruling. The court's discussion applies equally to Proposition 1:

> "[A]ppellants assert that the amendments, by their plain terms, effect and purpose, violate the fifth amendment by eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim: the amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either arguement." 627 F.2d at 1230.

II.

A STATE CONSTITUTIONAL AMENDMENT SUCH AS PROPOSITION 1, WHICH MODIFIES STATE-CREATED RIGHTS BUT EXPRESSLY PRESERVES ALL RIGHTS GUARANTEED BY THE FEDERAL CONSTITUTION, IS VALID UNDER THE FOURTEENTH AMENDMENT.

As this Court well knows, virtually all school desegregation lawsuits have been based upon the Federal Constitution and have been litigated in the federal courts. Such cases, of course, have been based on this Court's decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), and their progeny. California apparently stands alone in having a state constitution which has been judicially construed to require school desegregation under

circumstances which do not violate the Federal Constitution. It is therefore unlikely that the particular facts and circumstances involved here will be repeated.

This case does, however, present much broader and more fundamental concerns regarding the relationship between our state and federal constitutional systems. The California Supreme Court's decision in *Crawford I* is part of a growing trend among state courts to give independent vitality to their state constitutions and occasionally grant state constitutional rights more expansive than those guaranteed by the Federal Constitution.[11] Proposition 1 is not the first enactment adopted in response to that trend.

It is therefore important for this Court to determine the manner and circumstances in which a state may modify state-created rights, particularly through the use of a state constitutional amendment such as Proposition 1, which expressly preserves all rights and remedies guaranteed by the Federal Constitution.

A. The California State Courts Have Previously Upheld Enactments Similar to Proposition 1.

Petitioners have expressed alarm that the people of California have amended their constitution to conform the availability of court-ordered student reassignment to the requirements of the Federal Constitution. However, California has enacted similar amendments in the past, with the specific approval of the California courts. In fact, the history of the

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[11] *See, e.g.*, Mosk, *Contemporary Federalism*, 9 Pacific L.J. 711 (1978); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv.L.Rev. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va.L.Rev. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 Ky.L.J. 421 (1974); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 Calif.L.Rev. 273 (1973).

death penalty in California provides a striking parallel to Proposition 1.[12]

In *People v. Anderson*, 6 Cal.3d 628, 100 Cal.Rptr. 152, 493 P.2d 280, *cert. denied*, 406 U.S. 958 (1972), the California Supreme Court held that the California Constitution prohibited the death penalty. Like *Crawford I*, the court based its ruling squarely on the state constitution and declared the existence of rights more expansive than those under the Federal Constitution. 6 Cal.3d at 634-39.

Later in the same year, the people of California enacted an initiative measure which added article I, section 27 to the California Constitution. That provision purported to overrule *Anderson* by stating that the death penalty did not constitute cruel or unusual punishment under the state constitution.

In *People v. Frierson*, 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587 (1979), the California Supreme Court upheld the constitutionality of article I, section 27, and declared that it evidenced a clear intent by the electorate to conform the California Constitution to the Federal Constitution concerning the death penalty:

> "The clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty *to the extent permitted by the Federal Constitution*."

25 Cal.3d at 184-85 (emphasis in original). *See also, Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (noting that the enactment of article I, section 27 effectively negated the California Supreme Court's decision in *Anderson*).

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[12]Petitioners' statement at page 86 of their brief that Proposition 1 is "the only amendment since adoption of the state constitution in 1850 [sic] that restricts the autonomy of California courts with respect to an identified subject matter" is wrong.

Since the enactment of article I, section 27, the California courts have reviewed the death penalty pursuant to the Federal Constitution and federal decisional law. *See Frierson, supra,* 25 Cal.3d at 172-88; *People v. Jackson,* 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 (1980), *cert. denied,* 450 U.S. 1035 (1981). This of course is the same result achieved by Proposition 1, which also requires state courts to review mandatory reassignment of students pursuant to federal law.[13]

Petitioners have engaged in a long argument about purported acts of racial discrimination in the early history of California. Conspicuously absent from that discussion are any accusations against the California state courts, which have been recognized for their frequent construction of California constitutional provisions as providing greater protection of individual rights than comparable provisions of the Federal Constitution.[14] In addition, as exemplified by *Mulkey v. Reitman,* 64 Cal.2d 529, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), *aff'd* 387 U.S. 369 (1967), the California courts have relied on the Fourteenth Amendment to invalidate legislative enactments that, in the guise of repealing state-created rights, have infringed upon rights guaranteed by the Federal Constitution.

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[13]California is by no means unique in adopting state laws which incorporate standards under the Federal Constitution and federal decisional law. Many other states have done the same. *See* Greene, *Hybrid State Law in the Federal Courts,* 83 Harv.L.Rev. 289 (1969).

[14]*See generally,* Mosk, *Contemporary Federalism,* 9 Pacific L.J. 711, 714 and 718-20 (1978); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground,* 61 Cal.L.Rev. 273, 277 n.17 and 278 n.18 (1973). *See also, PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980).

The decision below by the Court of Appeal is by no means a departure from that tradition.[15] As the California Supreme Court did in *Frierson*, the Court of Appeal recognized that constitutional amendment by initiative and referendum is a normal and vital part of the governmental process in California, and judicial construction of the state constitution must give way to a proper expression of the people's will.

B. This Court's Decisions Have Given the States Broad Discretion in Developing and Modifying State-Created Rights, so Long as Rights Guaranteed by the Federal Constitution Are Not Taken Away.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court reviewed a decision of the California Supreme Court which permitted a group of students to distribute pamphlets and circulate petitions within a large privately owned shopping center. Like *Crawford I*, the California Supreme Court's decision was based on its conclusion that the California Constitution provided rights and privileges more expansive than those under the Federal Constitution. In this Court, the shopping center owner contended that the state constitutional rights created by the California Supreme Court violated his property rights and First Amendment rights under the Federal Constitution.

Under the facts presented, this Court unanimously held that the students' exercise of their state-created right of free speech did not violate the shopping center owner's rights

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[15]Moreover, the California Supreme Court's denial of the petition for hearing in this case does have significance. In *Eisenberg v. Superior Court*, 193 Cal. 575, 578, 226 P. 617 (1924), the California Supreme Court said "The order of this court denying a petition for transfer . . . after . . . decision of the district court of appeal may be taken as an approval of the conclusion there reached, but not necessarily of all the reasoning contained in that opinion." *Accord, Di Genova v. State Board of Education*, 57 Cal.2d 167, 178, 367 P.2d 865, 18 Cal.Rptr. 369 (1962).

under the Federal Constitution. 447 U.S. at 82-88. The Court's opinion explained that a state may properly grant rights and privileges more expansive than those guaranteed by federal law, so long as the state-created rights do not contravene any provisions of the Federal Constitution.[16] 447 U.S. at 80-81.

PruneYard demonstrates that an expansive declaration of state constitutional rights is a proper exercise of a state's prerogative if it does so in a manner which does not deprive its citizens of rights guaranteed by the Federal Constitution. Even though the California Supreme Court adopted a holding entirely different from the result reached by this Court under the Federal Constitution in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), this Court refused to interfere because *PruneYard* affected only state-created rights.

The rationale in *PruneYard* applies with equal force to a reduction or modification of existing state-created rights. Just as in *PruneYard*, the subject of inquiry must be the effect of the state's action upon rights guaranteed by the Federal Constitution. The Fourteenth Amendment does not invalidate an enactment such as Proposition 1, which reduces or modifies state-created rights but does so by expressly incorporating federal law and ensuring that a student's entitlement to the remedy of mandatory reassignment is identical to his entitlement under the Federal Constitution.

This principle was recognized by Justice Rehnquist when he analyzed Proposition 1 in September 1980:

> "Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the

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[16]The holding in *PruneYard* has been recognized by this Court on earlier occasions in dictum. *See Oregon v. Haas*, 420 U.S. 714, 719-20 (1975); *Sibron v. New York*, 392 U.S. 40 (1968); *Cooper v. California*, 386 U.S. 58 (1967) (all involving criminal procedure).

> federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution."

Board of Education of the City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980) (quoting Superior Court Judge Melvin E. Cohn's order upholding the constitutionality of Proposition 1 in *Tinsley v. Palo Alto Unified School District*, No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980).[17] The Court of Appeal adopted this analysis in upholding Proposition 1. *Crawford II*, 113 Cal.App.3d at 654.

This principle is also apparent from this Court's opinion in *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), which said:

> "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

Accord, Reynolds v. Sims, 377 U.S. 533, 584 (1964) ("[S]tate constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated."). *See also, North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1971) (affirming a District Court decision which declared unconstitutional a North Carolina anti-busing statute because it intruded upon federally protected rights).

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[17]The *Tinsley* plaintiffs have appealed Judge Cohn's determination that Proposition 1 is constitutional. On October 29, 1981, the California Court of Appeal, First Appellate District, ordered the appeal stayed pending this Court's ruling in *Crawford*.

There is nothing in Proposition 1 which deprives any California citizen of rights or remedies guaranteed by the Federal Constitution. Proposition 1 explicitly conforms state court use of mandatory reassignment to the same standards used by federal courts under the Federal Constitution. Under the California Constitution, the remedy of mandatory reassignment is available in all circumstances where the Federal Constitution requires its use.

In fact, Proposition 1 closely parallels federal statutes enacted by Congress pursuant to its power to enforce the Fourteenth Amendment. The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.*, places strict limitations on remedies which may be ordered to correct racial imbalance that does not violate the Fourteenth Amendment. Federal courts which have reviewed these provisions have concluded that "The Act manifests an intention of Congress that mandatory busing not be ordered to a greater extent than is required by the constitution." *Morgan v. Kerrigan*, 530 F.2d 401, 411 (1st Cir. 1976), *cert. denied*, 426 U.S. 935 (1976); *accord, Hart v. Community School Board*, 512 F.2d 37, 52 (2d Cir. 1975). This is the same effect achieved by Proposition 1.

C. The Theory Advanced by Petitioners Would Distort the Functioning of State Constitutional Law.

The Court of Appeal held that Proposition 1 conforms the California Constitution to the Federal Constitution in only one area: the power of a state court to order mandatory reassignment of students as a remedy for nonpurposeful and unintentional racial imbalance. *Crawford II*, 113 Cal.App.3d at 651. Even as amended by Proposition 1, the California Constitution provides broader protection than federal law. California state courts may still alleviate de facto segregation by ordering desegregation plans which rely on techniques

other than mandatory reassignment or transportation of students. In contrast, a federal court has no power to remedy de facto segregation under the Federal Constitution. *E.g., Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977) (*Dayton I*) ("The finding that the pupil population in the various Dayton schools is not homogenous, standing by itself, is not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of the Board."); *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977) (*Milliken II*) ("[T]he Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more.").

Despite the narrow effect of Proposition 1, petitioners claim that it violates the Fourteenth Amendment because it limits the use of a specific remedy which could be used in the vindication of a state constitutional right. However, petitioners have not identified any authority which interprets the Fourteenth Amendment as *requiring* a state to provide a specific remedy — or any remedy whatsoever — for the vindication of a purely state-created right.

The theory advocated by petitioners essentially regards the Fourteenth Amendment as a "ratchet wrench" which would permit states to expand but not contract state constitutional rights and remedies.[18] Under petitioners' theory, although the Federal Constitution would freely permit the expansion of state constitutional rights, any reduction of those same rights would be precluded by the Fourteenth Amendment unless a compelling state interest could be demonstrated. Members of this Court have expressed serious

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[18]As the Court of Appeal noted, petitioners took the extreme position below that the Fourteenth Amendment would prohibit California from reducing state-created rights and remedies in any area. *Crawford II*, 113 Cal.App.3d at 654.

objection to any interpretation of the Federal Constitution which would "lock in" the states to a particular course of action. *Palmer v. Thompson*, 403 U.S. 217, 228 and 230 (1971) (Burger, C.J., and Blackmun, J., concurring); *PruneYard Shopping Center v. Robins*, *supra*, 447 U.S. at 93 (Marshall, J., concurring); *Hunter v. Erickson*, 393 U.S. 385, 396-97 (1969) (Black, J., dissenting).

The "ratchet wrench" approach advocated by petitioners would limit the people of any state to a one-way exercise of their power to adopt changes in their state constitution. This would seriously distort the normal functioning of state constitutional law. Every state in the nation permits its legislature to propose constitutional amendments, and twenty-one states permit amendments by initiative and referendum.[19] As one commentator has noted: "While the Federal Constitution is amended infrequently and only with great difficulty . . . state constitutions by contrast are periodically revised to reflect changing values."[20]

Revision of the state constitution by direct participation of the people is an especially vital part of the governmental process in California. Under the California Constitution, the power of initiative and referendum is expressly reserved by the people (art. IV, § 1), and all constitutional amendments must be approved by a majority of the electorate (art. XVIII, § 1-4). These provisions were specifically designed to enable the electorate to participate directly in the formulation of governmental policy in California,[21] and they have been vigorously utilized for that purpose. Between 1884 and

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[19]W. Crouch, J. Bollens & S. Scott, *California Government & Politics*, 95 (5th ed. 1972).

[20]Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va.L.Rev. 873, 939 (1976).

[21]V.O. Key & W. Crouch, *The Initiative and Referendum in California*, 571 (1939).

1980, there were 735 constitutional amendments placed before the electorate of which 438 were approved.[22]

This Court has praised the referendum process as a means for "direct political participation" which is designed to "give citizens a voice on questions of public policy." *Eastlake v. Forest City Enterprises, Inc.*, 626 U.S. 668, 673 (1976). It has also described the referendum as a "procedure for democratic decisionmaking" which "demonstrates devotion to democracy." *James v. Valtierra*, 402 U.S. 137, 141 & 143 (1971).

Use of the initiative and referendum process is especially important when, as in this case, an amendment concerns state constitutional doctrine created by the judiciary and not an express provision written into the state constitution. When a state court's decision is based on its construction of the state constitution and the decision is not challenged as impairing federally-protected rights, it is not subject to review by this Court. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 489-90 (1965). For that reason, a state constitutional amendment may be the only means of limiting decisions by a state supreme court based upon independent and adequate state grounds. Indeed, in a decision by the Supreme Judicial Court of Massachusetts declaring the death penalty invalid under the state constitution, a concurring justice expressly noted that a constitutional amendment by initiative or referendum would provide an effective check on the court's power if the people disagreed with its decision. *Commonwealth v. O'Neal*, 369 Mass 242, 275, 339 N.E.2d 676, 694 (1975) (Hennessy, J., concurring).

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[22]California Secretary of State, *California Statewide Ballot Measures, 1884 to 1981*, 5 (1981). The history of constitutional revision in California has been described by one commentator as "constitutional amendomania." Comment, *California's Constitutional Amendomania*, 1 Stan.L.Rev. 279 (1949).

III.

PROPOSITION 1 IS FREE FROM THE IMPERMISSIBLE RACIAL CLASSIFICATIONS WHICH WERE CLEAR IN THE CASES RELIED UPON BY PETITIONERS.

Petitioners contend that Proposition 1 contravenes the Fourteenth Amendment because it "embodies an impermissible racial classification" that "interposes race-specific obstacles to state judicial relief." (Br. at 34.) The court below rejected this contention, as did the other courts that have considered Proposition 1's constitutionality. *See Board of Education v. Superior Court, supra,* 448 U.S. at 1345 (Rehnquist, J., Circuit Justice), which quoted Superior Court Judge Melvin E. Cohn's order upholding Proposition 1 in *Tinsley v. Palo Alto Unified School District,* No. 206010, Cal. Superior Ct., San Mateo County, July 10, 1980 (appeal pending).

In *Brown v. Califano, supra,* 627 F.2d 1221, the minority plaintiffs also contended that a series of amendments to congressional appropriations bills embodied an impermissible racial classification in violation of the Fifth Amendment. The Court of Appeals rejected their contention and held that "[t]he amendments here at issue make no classification along impermissible lines, . . ." 627 F.2d at 1230. The amendments to which the court referred prohibited HEW from using its authority to terminate federal funding

> "to induce school districts to require student transportation beyond schools closest to their homes. They do not in any way restrict HEW's authority to threaten or actually terminate funds with respect to any other desegregation remedy which would suffice. Thus, HEW can reject fund applications which fail to provide for magnet schools, faculty desegregation, school construction or school closings that enhance desegregation, or other nontransportation remedies it deems necessary

for compliance with Title VI and the Constitution." 627 F.2d at 1231 (footnotes omitted).

As the court summarized, "Congress wanted to ensure that mandatory busing orders derive either from local school officials or federal courts." *Id.*

The resemblance does not stop there. Like Proposition 1, the amendments challenged in *Brown v. Califano* were enacted promptly after court orders requiring HEW to resume its enforcement of Title VI of the Civil Rights Act of 1957. 627 F.2d at 1223 n.1. Also like Proposition 1, nothing in the amendments restricted a court's power to order busing to remedy Fourteenth Amendment violations. Appellants, like petitioners here, criticized the amendments as "eliminating 'the single, proven, and most effective remedy for desegregating schools receiving federal aid.' " 627 F.2d at 1230.

The amendments upheld in *Brown v. Califano* removed the power to compel busing from the arsenal of techniques HEW could employ to desegregate schools that receive federal funding. If those amendments "make no classification along impermissible lines," as the Court of Appeals held, then Proposition 1 also does not.

The issue which *Brown v. Califano* decided and which this case presents, is whether the elimination of a previously available remedy that is not constitutionally required can be said to violate the United States Constitution because the use of the remedy had affected minority students. This Court has already decided a closely analogous question by holding that a state agency may constitutionally rescind an act that it was not constitutionally required to perform. *Dayton I, supra,* 433 U.S. at 413-14; *accord, Dayton Board of Education v. Brinkman,* 443 U.S. 526, 531 n.5 (1979) (*Dayton II*). The fact that the rescinded act affected minority students

did not create an improper racial classification in *Dayton I* and does not do so here.

Petitioners rely heavily on *Hunter v. Erickson, supra*, 393 U.S. 385,[23] *Reitman v. Mulkey, supra*, 387 U.S. 369, and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), *aff'd mem.* 402 U.S. 935 (1971), in arguing that state action eliminating state protection from racial discrimination violates the Fourteenth Amendment. But the holding of these cases, particularly when examined in light of *Dayton I*, does not support petitioners' position. To be sure, in both *Hunter* and *Reitman* the state action held to violate the Fourteenth Amendment repealed fair housing statutes that were not constitutionally required, but in each instance the challenged legislation eliminated more rights than the repealed statutes had granted, leaving the minority plaintiffs worse off than if the fair housing measures had never been enacted.

In *Hunter*, for example, this Court noted that although Akron was not required to have a fair housing ordinance, the city could not properly impose greater requirements to the enactment of fair housing legislation than had to be met for other types of housing legislation. 393 U.S. at 396. The challenged city charter amendment required all ordinances concerning housing discrimination on the basis of race, religion or national origin to be approved by a majority vote of the city electorate after passage by the city council but did not require any voter ratification for other housing ordinances. Thus the wrong flowing from the charter amendment was clear: minority citizens suffered from an increased burden in enacting fair housing ordinances. This made the charter amendment a clear violation of the Equal Protection

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[23]In *James v. Valtierra*, 402 U.S. 137, 140-41 (1971), this Court refused to extend *Hunter* because the California constitutional provision in question, like Proposition 1, did not create a racial classification.

Clause of the Fourteenth Amendment, because it "was an *explicitly* racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389 (emphasis added).

In *Reitman* this Court affirmed the California Supreme Court's invalidation of a state constitutional amendment which (1) repealed state unfair housing legislation, (2) applied a state constitutional imprimatur to private racial discrimination in the sale and rental of housing and (3) prohibited the enactment of fair housing statutes or ordinances by the state or any of its counties, cities or towns. Although each of these effects disadvantaged the same racially identifiable class, this Court found only the second and third constitutionally invalid.

Both *Hunter* and *Reitman* stated that no Fourteenth Amendment violation would have occurred if the state had done no more than eliminate the rights it had previously granted. *Hunter*, 393 U.S. at 390 n.5; *Reitman*, 387 U.S. at 376 & 380-81. *Accord*, *Dayton I*, 433 U.S. at 413-14; *Dayton II*, 443 U.S. at 531 n.5. Proposition 1 does not eliminate any state or federal right, and even before its enactment the California Supreme Court had declared in *Crawford I* that busing was not a constitutionally-required remedy for de facto segregation:

> "[C]ourt decisions time and time again have emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. . . . As with the numerous desegregation techniques adverted to above, in some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." 17 Cal.3d at 309.

The resemblance between the present case and *Lee v. Nyquist* is superficial at best and disappears after brief analysis. The state law declared invalid in *Lee* was a flat prohibition against racial reassignment for school desegregation by appointed school boards. 318 F.Supp. at 712. Although the district court overturned the New York Education Law provision in part as an impermissible racial classification, the Court's memorandum affirmance does not constitute an endorsement of that court's reasoning. *Mandel v. Bendley*, 432 U.S. 173, 176 (1977). The affirmance of *Lee v. Nyquist* is fully explained by this Court's decision in *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1971), which also declared a flat prohibition against busing unconstitutional. *Swann* compels the result in *Lee* and was decided less than two weeks earlier.

Finally, petitioners have relied heavily on *Seattle School Dist. No. 1 v. Washington*, 633 F.2d 1338 (9th Cir. 1980), now No. 81-9 before this Court. As interpreted by the Ninth Circuit Court of Appeals, Washington Initiative 350 contains the same absolute prohibition against busing for desegregation that was declared invalid in *North Carolina Board of Education v. Swann, supra*, 402 U.S. 43, and *Lee v. Nyquist, supra*, 318 F.Supp. 710. As the Ninth Circuit Court of Appeals explained in distinguishing *Seattle* from *Brown v. Califano, supra*, 627 F.2d 1221,

> ". . . Initiative 350 flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. This is significantly different from the amendments, which the *Brown* court concluded did not 'make [a] classification along impermissible [racial] lines.' " 633 F.2d at 1347.

Proposition 1 differs from Initiative 350 for the same reasons.[24]

The Ninth Circuit Court of Appeals held that the flat prohibition it found in Initiative 350 impermissibly interfered with local school districts' control of their schools:

> "Initiative 350 effectively disenfranchises the voters of the local school districts with respect to local educational matters. The interest of the State of Washington in mandating a state-wide policy of neighborhood schools must, in these circumstances, fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy." 633 F.2d at 1346.

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[24]The classification that Proposition 1 makes among remedies is by no means racial. It plainly prohibits a state court from ordering any busing that is not required to remedy a Fourteenth Amendment violation, and neither its language nor the Attorney General's official ballot summary (J.A. 257-58) mentions either race or desegregation. Proposition 1 was supported by all races, and passed in every county. In fact, the two counties in which it received the lowest percentage of the vote were Humboldt and Marin (53.2% and 55.2% approval, respectively), which have virtually all-white populations, while it received the approval of 73.9% of the voters in Los Angeles County, where the minority population is nearly 50%. California Secretary of State, *Statement of the Vote, November 6, 1979 Election*, 3.

The Court of Appeal quite logically limited its discussion of Proposition 1 to its effect on desegregation cases such as the one before it, and made no attempt to catalog its effects on other types of pupil school assignment or transportation, which were not involved in the case. *Crawford II*, 113 Cal.App.3d at 653. The flat assertion in petitioners' brief (at pp. 45-46 n.25) that "mandatory student assignment for . . . relieving overcrowded schools or fulfilling the educational rights of handicapped children . . . remains untouched" by Proposition 1 is contrary to the amendment's plain language. Significantly, petitioners cite no authority to support that contention. To the contrary, *Amador Valley Joint Union High School Dist. v. State Board of Equalization*, 22 Cal.3d 208, 245-46, 149 Cal.Rptr. 239, 583 P.2d 1281 (1978), which petitioners cite (Br. at 41 n.22), states that "a constitutional amendment should be construed in accordance with the natural and ordinary meaning of its words," and notes that "the ballot summary and arguments and analysis presented to the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language."

In contrast, Proposition 1 specifically reserves to local school boards the power to implement a busing plan voluntarily.

IV.

PROPOSITION 1 DOES NOT HAVE AN UNCONSTITUTIONAL PURPOSE OR EFFECT.

In part two of their brief, petitioners attribute to Proposition 1 an unconstitutional purpose and effect, in violation of this Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In support of their argument, petitioners have referred the Court to newspaper clippings, campaign literature, historical treatises and other voluminous materials which they placed in the Joint Appendix.

All of the materials contained in the Joint Appendix were also presented to each of the state courts below, and none of those courts accepted the arguments advanced by petitioners. The record below contains no finding of any impermissible purpose behind Proposition 1. Quite to the contrary, the Court of Appeal carefully analyzed the arguments and materials presented by petitioners and concluded that Proposition 1 does not have a discriminatory purpose or effect. *Crawford II*, 113 Cal.App.3d at 650-55. Indeed, the court characterized petitioners' arguments as "pure speculation." 113 Cal.App.3d at 655.

Petitioners apparently concede the absence of direct evidence or findings in support of their arguments because they contend that "discriminatory purpose may be *inferred* from the totality of relevant facts." (Br. at 64; emphasis added.) It is not necessary, however, for this Court to engage in its own fact finding or make inferences from the record. The Court of Appeal engaged in a full analysis which is

consistent with the decisions of this Court. In addition, the voluminous materials offered by petitioners to prove an impermissible purpose behind Proposition 1 were never admitted in evidence or judicially noticed by the trial court during the six-month trial below.

A. As in *Reitman v. Mulkey*, This Court Should Accept the Holding Below Regarding the Purpose and Effect of Proposition 1.

Although petitioners have relied extensively on this Court's opinion in *Reitman v. Mulkey*, *supra*, 387 U.S. 369, they have ignored one of its principal holdings. In *Reitman*, the California Supreme Court examined the "immediate objective," "ultimate effect" and "historical context" of Proposition 14 and concluded that the proposition unconstitutionally involved the state in private racial discrimination concerning housing matters. In affirming, this Court gave extreme deference to the conclusions drawn by the California Supreme Court:

> "Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 14], and familiar with the milieu in which that proposition would operate, has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court." 387 U.S. at 378-79; *accord*, 387 U.S. at 373-74 & 381.

Petitioners contend that an examination of the "immediate objective," "ultimate effect," and "historical context" of Proposition 1 demonstrates a similarly unconstitutional purpose and effect. However, the California Court of Appeal engaged in precisely that analysis and held that Proposition 1 does not have a discriminatory purpose or

effect. *Crawford II*, 113 Cal.App.3d at 650-56. As in *Reitman*, this Court should accept that holding.

Petitioners have challenged the Court of Appeal's holding because it was not based upon any trial court evidence or findings that were specifically directed to the purpose and effect of Proposition 1. Petitioners apparently contend that the Court of Appeal's holding cannot be supported by anything short of a broad-ranging trial about the motivations and beliefs of the electorate. In *Reitman*, however, this Court accepted the holding about the purpose and effect of Proposition 14 even though there had been no evidentiary hearings of any kind at the trial court level. The California Supreme Court's opinion in *Mulkey v. Reitman*, 64 Cal.2d 529, 532, 50 Cal.Rptr. 881, 413 P.2d 825 (1966), states clearly that "[i]n the trial court proceedings allegations of the complaint were not factually challenged, no evidence was introduced, and the only matter placed in issue was the legal sufficiency of the allegations."

The deference shown by this Court in *Reitman* is particularly appropriate under the circumstances of this case. This Court has noted that it is extraordinarily difficult to determine legislative motives and purposes. *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Analysis of subjective purpose and motivation approaches the impossible when the subject of inquiry is an initiative or referendum, for which the electorate makes decisions in the privacy of a voting booth.

B. The Court of Appeal's Holding About the Purpose and Effect of Proposition 1 Is Supported by the Record.

The most instructive evidence about the purpose of Proposition 1 is the language of the proposition itself. As this Court has held, "[t]here is, of course, no more persuasive

evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966).

Petitioners contend that Proposition 1 was designed to end school desegregation in California, but its language certainly does not accomplish that purpose. Proposition 1 is extremely narrow in its focus and effect. As the Court of Appeal held, it simply conforms state court use of mandatory reassignment to the requirements of the Fourteenth Amendment. *Crawford II*, 113 Cal.App.3d at 651-52. Far from ending school desegregation efforts, it leaves many effective remedies unchanged and still permits courts to order mandatory student reassignment when a Fourteenth Amendment violation is found.

In *Brown v. Califano, supra*, 627 F.2d at 1234 n.78, the Court of Appeals rejected arguments about improper purpose similar to those made in this case by petitioners. The plaintiffs offered many statements by individual congressmen that revealed opposition to mandatory busing of students. The Court of Appeal, however, held that legislative motive was not even relevant because the statute was narrowly drawn. *See also, United States v. O'Brien, supra*, 391 U.S. at 383.

Even the materials petitioners have presented to this Court in the Joint Appendix show that Proposition 1 was not motivated by an improper purpose. At most, petitioners' materials show opposition to mandatory busing of students — not racial discrimination. Thus, while petitioners have quoted some of the remarks contained in the California Secretary of State Ballot Pamphlet for the November 6, 1979, election, they have ignored the arguments in favor of Proposition 1 by the Reverend W. C. Jackson. Rev. Jackson is a black parent and the pastor of the Beth Ezel Baptist Church in Watts, a minority neighborhood in south-

central Los Angeles. J.A. 268-69. Rev. Jackson urged the adoption of Proposition 1, and quoted Los Angeles Mayor Tom Bradley, also a black parent, as saying: "Most parents, whatever their color, whatever their background, wherever they live, don't want their kids transported back and forth across the city." J.A. 268.

The official election returns for Proposition 1, compiled by California Secretary of State March Fong Eu, show that the voting patterns in California were completely unrelated to race. It was enacted by 68.6% of the electorate, and it was approved by a majority of the voters in each one of the state's 58 counties. California Secretary of State, *Statement of the Vote, Nov. 6, 1979 Election*, 3-4. It received more than 50% of the vote in 79 of the state's 80 assembly districts, many of which have elected minority assembly representatives. *Id.* at 43-46. Even in the single assembly district in which it failed to receive a majority of the vote, it was approved by 46.2% of the voters.[25] *Id.* at 46.

C. The Newspaper Clippings, Campaign Literature and Other Materials Presented by Petitioners Are Inadmissible and Not Properly Before This Court.

Petitioners have stated that they were the only party to introduce evidence at the trial court level regarding the purpose and motivation underlying the enactment of Proposition 1. (Br. at 24 and 91.) This is a misleading description of the proceedings below.

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[25]The same California electorate which approved Proposition 1 has in recent years elected an Asian United States Senator, a black Lieutenant Governor, an Asian Secretary of State, a black State Superintendent of Public Instruction, and many other Hispanic, black and Asian public officials. One of the leading contenders in the upcoming gubernatorial election is Los Angeles Mayor Tom Bradley, who is black.

Petitioners did not introduce any testimony, exhibits or other evidence on this subject. They simply lodged a voluminous "appendix" with the trial court containing newspaper clippings, campaign literature, excerpts from historical treatises, and other unofficial documents. J.A. 191-256. They later submitted a copy of the California Secretary of State Ballot Pamphlet for the November 6, 1979, election. J.A. 257-79. These materials were "authenticated" by a declaration by one of petitioners' attorneys, who merely said he had "examined" them. J.A. 191.

Petitioners cannot even say that the materials in their appendix were judicially noticed by the trial court. Under California law, a party must make a specific request for a trial court to take judicial notice. Cal. Evid. Code §§ 450 and 452. If the subject matter of the request "is of substantial consequence to the determination of the action," the court must give the opposing party an opportunity to respond (*id.* § 455), and it must then determine "the propriety of taking judicial notice of a matter or the tenor thereof" (*id.* § 454). This procedure was not followed in the trial court. Petitioners never requested the court to take judicial notice of the materials in their appendix and the court did not do so on its own motion.

The District moved to strike petitioners' appendix as irrelevant, without foundation, and based on hearsay. J.A. 307-08. The trial court did not rule on the District's motion and declared it moot, because the court did not determine the constitutionality of Proposition 1. Cert. Petition 20A.

In fact the District's motion to strike was well-taken. The newspaper clippings and other second-hand documentary evidence submitted by petitioners are clearly inadmissible hearsay. *Shumate v. Johnson Pub. Co.*, 139 Cal.App.2d 121, 133, 293 P.2d 531 (1956). The historical treatises are also inadmissible hearsay. Cal. Evid. Code § 1341; B. Jef-

ferson, *Cal. Evidence Benchbook* § 17.2. Finally, the campaign literature, newspaper clippings and other materials concerning remarks by the author of Proposition 1 are not only hearsay but also have very little evidentiary value. *Lewis v. Ryan*, 64 Cal.App.3d 338, 355 n.1, 134 Cal.Rptr. 355 (1976). *Accord, Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").[26]

Finally, the historical material presented by petitioners concerning purported acts of discrimination in California's early history have no relevance to the constitutionality of Proposition 1. Many of the incidents described by petitioners occurred even before the adoption of the Thirteenth and Fourteenth Amendments, and virtually all occurred before this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Many pages of this brief could be spent refuting petitioners' lengthy arguments about the early history of California, but the short answer is contained in the recent plurality opinion in *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (Stewart, J.):

> "But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case.

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[26]Petitioners suggest that if their showing in this Court is insufficient, the case should at least be remanded for further hearings on the purpose and motivations behind Proposition 1. (Br. at 93 n.53; *see also* amicus briefs of Lawyers' Committee on Civil Rights at 13, and African American Education Commission, et al., at 51.) However, in the state courts below petitioners relied entirely on their newspaper clippings, campaign literature and other unofficial documents. They never requested hearings in the trial court on the electorate's purpose and motivations, nor did they urge the California Court of Appeal or the California Supreme Court to remand for that purpose.

More distant instances of official discrimination in other cases are of limited help in resolving that question."

V.

OTHER MATTERS INDIRECTLY RAISED BY PETITIONERS DO NOT CONCERN THE QUESTIONS BEFORE THIS COURT AND CANNOT AFFECT THE VALIDITY OF THE RULING BELOW.

The previous sections of this brief have addressed the arguments and questions that are directly raised by petitioners' opening brief on the merits. However, petitioners' brief also includes a long "special appendix" which contains an argumentative summary of the proceedings in this case. (Br. at A1-A35.) Besides lengthening their brief in apparent violation of Supreme Court Rule 33.3, the special appendix seems designed to indirectly raise several matters that are not before this Court. Because these matters are not directly at issue, we hesitate to address them at all, but a brief response seems appropriate.

A. Assertions of De Jure Violations.

Petitioners' special appendix contains a number of remarks which are apparently designed to raise indirectly the question whether the District has engaged in acts of de jure segregation in violation of the Fourteenth Amendment. That question was thoroughly considered by the Court of Appeal. After extensive briefs and a plenary hearing, the court concluded that the record did not contain any evidence of de jure violations. *Crawford II*, 113 Cal.App.3d at 638-50. The California Supreme Court, which in 1976 reviewed the original findings of the trial court and expressed views about them in dictum, refused to overturn the Court of Appeal's determination.

Petitioners have not challenged the Court of Appeal's holding in this Court. Their petition for certiorari did not include a question directed to the existence of any de jure violations, and they have not made any motion to amend their petition.[27] In *Irvine v. California*, 347 U.S. 128, 129 (1954), this Court stated: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari." We therefore suggest that petitioners' special appendix and their remarks about de jure segregation should be ignored.

Two amici curiae (the African American Education Commission, *et al.*, and the Lawyers' Committee on Civil Rights) have suggested that the case should be remanded for further proceedings on de jure issues. The rule against "smuggling additional questions into a case" applies to them as well. Furthermore, petitioners have already had at least three recent opportunities in the trial court to prove or specify de jure violations, and they have *declined* to do so.

In its original application filed in November 1979 the District specifically requested hearings to determine whether any current Fourteenth Amendment violations existed, but petitioners opposed that request. J.A. 189. When the trial court denied its application in May 1980, the District requested findings of fact. C.T. 16965. The court's findings, which petitioners prepared and the court signed without change, relied entirely on the ten-year-old findings entered by Judge Gitelson, even though the parties had just completed a six-month trial which examined all facets of the District's operations. Cert. Petition 81A-83A. Finally, the Court of Appeal's decision remanded the case to the trial

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[27]In fact, on page 48 of their brief on the merits, petitioners state: "For it is racial discrimination in the judicial apparatus of the state, *not racial discrimination of the state's schools*, that petitioners challenge under the Fourteenth Amendment in this case." (Emphasis added.)

court for further proceedings. *Crawford II*, 113 Cal.App.3d at 656. When those proceedings were resumed before Judge Lopez last year, petitioners did not allege any de jure violations by the District and they did not seek to have that question litigated.

B. Remarks About Petitioners' "Vested Right" to Mandatory Reassignment.

The Court of Appeal held that Proposition 1 did not deprive petitioners of any "vested right" in violation of the due process clause of the Fourteenth Amendment. *Crawford II*, 113 Cal.App.3d at 655-56. The petition for certiorari specifically challenged that holding in one of the questions presented for review (Cert. Petition ii), but petitioners' brief on the merits fails to address that question and contains only indirect contentions that Proposition 1 deprives them of a vested right. Under this Court's normal practice, petitioners' failure to address the question directly in their brief on the merits constitutes an abandonment. *See Travelers Health Assn. v. Virginia*, 339 U.S. 643, 651 n.4 (1950). If petitioners should claim that they have not abandoned this question, the District incorporates the discussion contained on pages 19 through 20 of its brief in opposition to the petition for certiorari.

C. Remarks About the Effectiveness of Mandatory Reassignment Within the District.

Petitioners' special appendix attempts to create the impression that mandatory reassignment of students is the only effective desegregation remedy within the District and that the two mandatory desegregation plans in operation between 1978 and 1980 utilized that tool with productive and effective results. These arguments have little to do with the constitutionality of Proposition 1, and they are in all events wrong.

The District has had three years of experience with mandatory reassignment under two different plans, and the results have been tragic. Rather than producing desegregation, the mandatory components of Plans 2 and 3 caused previously integrated schools to become minority segregated and left most of the targeted minority schools essentially unchanged. Between 1976 and 1980, the District's white enrollment declined by 42.7%. Compare J.A. 547 and 548. Those losses were concentrated at schools involved in mandatory reassignment, where the white loss rate was over 75% in some instances. *See generally*, Trial Ex. 107; Dist. App. at 996.

In contrast to the counterproductive results under mandatory reassignment, the voluntary components of Plans 2 and 3 provided minority students with a stable, desegregated education. The District has assessed the performance of the plans in use over the past three years and has concluded that a voluntary desegregation plan would produce the best results.[28] In *Crawford I*, the California Supreme Court declared that "local school boards should clearly have the initial and primary responsibility for choosing between . . . alternative [desegregation] methods." 17 Cal.3d at 305. The Court of Appeal pointedly criticized the trial court for failing to abide by that principle. *Crawford II*, 113 Cal.App.3d at 649.

Petitioners' remarks about the effectiveness of mandatory reassignment are based largely upon findings of fact entered by Judge Paul Egly in May 1980 before the implementation

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[28]On page A-29 of their special appendix, petitioners claim that the District's all-voluntary desegregation plan was opposed by Rita Walters, "the only minority member" of the Board of Education. If by "minority member" petitioners mean the only Board member who opposed the plan, they are correct. However, the plan was supported by Board member Anthony Trias, who is an Asian.

of Plan 3. However, following last summer's trial Judge Robert Lopez approved the District's voluntary desegregation plan and terminated further jurisdiction. In his September 10, 1981, order, Judge Lopez concluded:

> "A genuine opportunity must be given to the Board to show progress *under present conditions*. The Court finds that the Board has embarked on a course of action that under present conditions seeks to realize the hope of society and alleviate the various harms to the children in the District. After the balancing and reconciliation of many competing values, the Court finds that the Plan, as ordered changed by the Court, will protect the rights of all students and meet Constitutional standards." September 10, 1981, Order, *infra* at A7-A8 (emphasis in original).

CONCLUSION

The decision below by the California Court of Appeal should be affirmed.

Respectfully submitted,

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APPENDIX

Article I, Section 7. Due process; Equal protection; Privileges and immunities

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of

such modification. In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

Order Re Final Approval of School Board Desegregation Plan and Discharge of Writ of Mandate.

Superior Court of the State of California for the County of Los Angeles. No. 822 854.

Mary Ellen Crawford, a minor etc., et al., Petitioners, vs. Board of Education of the City of Los Angeles, Respondent.

Better Education for Students Today; Bustop, a corporation; Charles Dreebin, et al.; Robert M. Loveland and Mary Keipp; United Teachers/Los Angeles, Intervenors.

Filed: September 10, 1981.

More than 18 years have passed since this class action was filed seeking desegregation of the schools of the Los Angeles Unified School District. All facts material to the case have changed since the case was filed in 1963. Even the nomenclature employed has become outdated, misleading and harmful to innocent children. Educational quality has been displaced as the prime focus of public attention. There must be a commitment to excellence in education to fulfill the expectations of all children in the District.

A case that involves the education of children must be resolved. There must be finality in the law so that the people may plan their everyday lives to conform to the requirements of the law.

The time has come for common sense to return to the treatment of desegregation in the public schools. The framework of law is provided by the guidelines given this court in the decisions in this matter rendered by the Supreme Court and the Court of Appeal and each of them.[1]

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[1]*Crawford v. Board of Education*, 17 C.3d 280 (June, 1976), hereinafter referred to as Crawford I, and 113 Cal.App.3d 633 (Dec. 1980), hereinafter referred to as Crawford II.

These decisions place a duty upon the trial court to oversee a process of desegregation planning wherein the Board of Education elected by the people is the primary planner.[2] The law precludes judicial intervention in the planning and/or implementation process "even if [the Court] believes that alternative desegregation techniques may produce more rapid desegregation" (*Crawford* I at p. 306), so long as a plan developed by the elected Board of Education utilizes reasonably feasible steps to produce "meaningful progress in light of present conditions."[3] The Board is under a constitutional duty to undertake reasonably feasible steps to alleviate school segregation, regardless of cause.[4]

The respondent Board has submitted to the court a "Plan for Desegregation," dated July 2, 1981. After review and consideration of the plan submitted and the entire record, and each of them, the Court has determined that certain principles should govern the operation of the plan as set out below. The function of a trial court is to apply the law. This court will follow the law, recognizing its responsibility to protect all the children in the District. The law imposes on

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[2]*Crawford I*, *supra*, at p. 305. The Supreme Court said: "Under these circumstances, local school boards should clearly have the initial and primary responsibility for choosing between these alternative methods."

[3]*Crawford II*, *supra*, at p. 649. The Court of Appeal quoted the Supreme Court as follows: " '. . . *so long as a local school board initiates and implements reasonably feasible steps* to alleviate school segregation in its district, and so long as such steps produce meaningful progress [4] . . . *we do not believe the judiciary should intervene in the . . . process . . . Reliance on the judgment of local school boards in choosing between alternative desegregation strategies holds society's best hope for the formulation and implementation of desegregation plans* which will actually achieve the ultimate constitutional objective of providing minority students with the equal opportunities potentially available from an integrated education.' (*Crawford I*, *supra*, at pp. 305-306.)" The Court of Appeal stated, "We interpret that phrase to mean *meaningful progress in light of present conditions. A genuine opportunity to show such progress under a plan of its own has not yet been afforded the Board.*" (fn. 4) (Emphasis supplied)

[4]*Crawford I*, *supra*, pp. 301-302, *Crawford* II, p. 651.

the trial court "a duty to supervise the preparation and implementation of a reasonably feasible desegregation plan."[5]

The Court, having reviewed and considered the entire record in this matter, and having considered the various memoranda, evidentiary, and informational matters submitted by the parties, and further having considered argument of all counsel and all of the above, and each of them, makes the following order:

1. The District may proceed to construct new schools and to build additions to existing schools as overcrowding and other needs require.
2. The definition of groups used in the plan is ordered changed forthwith to end the use of terminology classifying Black, Hispanic, and Asian children, as well as those of other non-Anglo ancestries, as "Minority" students.

   This usage is factually incorrect. These students in fact comprise the vast majority of the school population.[6]

   To label a group a minority when it is a majority is harmful to those children. Facts, as opposed to labels, are not harmful to children. Society expects and demands factual representations by educators and elected School Boards.

   It is the duty of the Board and the District, and each of them, to use factual descriptions. They must reflect the current composition of the student

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[5]*Crawford II, supra*, p. 651.

[6]*Crawford II, supra*, p. 642, fn. 2: "In October 1980 the composition of the student population was White 23.7 percent, Black 23.3 percent, Hispanic 45.3 percent, Oriental and other 7.7 percent. The number of white pupils in grades K-3 had fallen to 16.1 percent." Compare the above with the outdated statistical composition upon which the case was first argued: "In 1968 the racial and ethnic composition of the students was 53.6 percent white, 22.6 percent Negro, 20 percent Hispanic, and 3.8 percent Oriental and other." *Crawford II, supra*, p. 642 (fn. 2).

population for the applicable school year. The Board and the District, and each of them, are ordered forthwith to use words that honestly reflect the facts as they exist in the current school year. The Court will refer to the facts as they are in the real world.

The facts are that students previously called the "minority" are actually the "majority." Therefore, these students will hereinafter be referred to as "Black", "Hispanic", or "Asian and Other", as appropriate. History does change, and when it does it must be reported accurately.

The use of the term RIMS (Racially Isolated Minority Schools) shall cease forthwith. Use of this label is deceptive, demeaning and inaccurate. The District is ordered to use a neutral term in its place. The neutral term shall not utilize the word "minority."

The old labels are harmful to the self esteem of the very children this action purports to protect.[7]

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[7]Crawford II, p. 648. The Court of Appeal quoted the Supreme Court as follows: "In a school district in which "minority" students significantly outnumber "majority" students, a school whose racial composition might in some other district make it a "segregated school" may not warrant that legal characterization. (fn. 1) (Crawford, p. 304, fn. 16)." The Court of Appeal went on to say: "That of course is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades to K-3. Yet for the purpose of applying the legal principles related to school segregation, whites are still designated as the "majority" and segregation is viewed in terms of the minorities, or any one of them, being isolated from whites. (fn. 3)" The court said further, in footnote 3, "That approach appears to be a hangover from the historic situation in some areas in the country which produced the background against which the decision in *Brown v. Board of Education, supra,* was rendered. The wisdom of, or the need to, perpetuate that approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic "minority" children, even when they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students."

3. All new elementary and junior high school Magnet schools and programs established under this plan will be located in the areas of predominantly Hispanic, Black, or Asian and Other enrollment.
4. The pupil-teacher ratio in predominantly Hispanic, Black, or Asian and Other schools operated under this plan must be maintained at 27:1 or less in order to enrich the opportunities for students.
5. All Hispanic, Black, Asian and Other pupils who volunteer are entitled to access to all programs involving the voluntary transfer of students.
6. The Board of Education is ordered to publicize the transfer options open to pupils in areas where most Hispanic, Black, or Asian and Other families reside.
7. The District must issue annual reports on educational conditions and achievement in predominantly Hispanic, Black, or Asian schools and distribute these reports to parents and students and each of them.
8. The share of desegregation expenditures allocated to payment of administrative expenses shall not exceed the administrative expense ratio characteristic of the District's overall budget.
9. The District shall prepare, and make public on or before July 15, 1983, a full report of the measures taken and results achieved under its Plan. The report shall focus on whether the Plan has achieved meaningful progress toward the goals set forth in *Crawford* I and II, and each of them, within the constraints exerted by present conditions.

A genuine opportunity must be given to the Board to show progress *under present conditions*. The Court finds that the Board has embarked on a course of action that under present conditions seeks to realize the hope of society and

alleviate the various harms to the children in the District. After the balancing and reconciliation of many competing values, the Court finds that the Plan, as ordered changed by the Court, will protect the rights of all students and meet Constitutional standards.

The time has come to end these proceedings. There must be finality in the law. The mandate to take reasonably feasible steps to desegregate the District is clear. The Board remains subject to its constitutional duty under State law to undertake reasonably feasible steps to alleviate school segregation regardless of cause. There are matters which deeply concern the Court in respect to the instant litigation. However these concerns should not be made the springboard for examination of procedures which implement the new Plan. The underlying issues have been resolved. Judicial intervention is no longer appropriate. The people, who are the ultimate authority, must look to the School Board, as their elected representatives, to continue to discharge its duty under the law.

The Court finds that respondent Board of Education has satisfied the mandate of the Court issued May 19, 1970, interpreted in light of the opinions expressed by the Supreme Court in *Crawford v. Board of Education* (Crawford I), *supra*, and the Court of Appeal in *Crawford v. Board of Education* (Crawford II), *supra*, and each of them, and, so finding, orders the writ discharged.

All outstanding Orders of the Superior Court in this matter, save the Minute Orders re Court Monitors, are vacated, effective this date. The Court retains jurisdiction for the sole purpose of determining the matter of attorneys' fees.

September 10, 1981

/s/ Robert B. Lopez
Judge Robert B. Lopez

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-38

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Equal Protection Clause is violated by a state constitutional amendment that conforms to the contours of the Fourteenth Amendment the remedial power of state courts to order mandatory pupil transportation.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-38

MARY ELLEN CRAWFORD, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the state court of appeal (Pet. App. 1A to 71A) is reported at 113 Cal. App. 3d 633, 170 Cal. Rptr. 495. The opinions of the state superior court (Pet. App. 76A to 80A, 81A to 93A) are unreported.

An earlier opinion of the state supreme court is reported at 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724. An earlier opinion of the state court of appeal is reported at 69 Cal. App. 3d 66, 137 Cal. Rptr. 793.

Opinions issued in 1978 and 1980 by Justices of this Court denying applications for stays are reported at 439 U.S. 1380, 439 U.S. 1384 and 448 U.S. 1343.

JURISDICTION

The judgment of the state court of appeal was entered on December 19, 1980 (Pet. App. 1A). A petition for hearing was denied by the state supreme court on March

11, 1981 (Pet. App. 73A). The petition for a writ of certiorari was filed in this Court on July 8, 1981 and was granted on October 13, 1981. The jurisdiction of the Court rests on 28 U.S.C. 1257(3).

INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibilities with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* The United States has participated as either a party or amicus curiae in virtually every one of the Court's cases involving allegations of racial discrimination in public schools, including *Washington* v. *Seattle School District No. 1*, No. 81-9, scheduled for oral argument in tandem with this case, in which the United States is a party.

STATEMENT

This case, like *Washington* v. *Seattle School District No. 1*, No. 81-9, involves a constitutional challenge to an attempt by the citizens of a state to enact legislation favoring neighborhood schools. Here, the voters and legislature of the State of California adopted a constitutional amendment, known as Proposition 1, that freed school boards in the state from "any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation" (Cal. Const. art. 1, § 7(a) (amended 1979)). The plaintiffs in an ongoing state court case seeking elimination of racial imbalance in the Los Angeles school district challenged the federal constitutionality of the Proposition. The state court of appeal concluded that Proposition 1 is constitutional, and the California Supreme Court denied hearing.

1. In 1963, a number of minority children attending school in the Los Angeles Unified School District filed a

class action in state superior court seeking the elimination of racial imbalance in the district's schools (17 Cal. 3d at 286). In 1968, after years of unsuccessful settlement efforts by the plaintiffs, the case proceeded to trial (*id.* at 287).[1] In 1970, the trial court issued an opinion finding the school district racially imbalanced (*id.* at 287-289) and ordering the board of education immediately to prepare and implement a racial balancing plan (*id.* at 289).

On appeal, the California Supreme Court affirmed the lower court order on the basis of California precedent that school boards bear a state constitutional obligation "to take reasonably feasible steps to alleviate school segregation 'regardless of its cause'" (17 Cal. 3d at 285, quoting *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881, 130 Cal. Rptr. 724, 726 (1963)), although the court stated that the trial court's findings supported the conclusion that the district's racial imbalance was the result of de jure segregation.

On remand, the trial court reviewed and rejected the school board's first submitted racial balancing plan, which provided for only limited mandatory reassignment of students (Pet. App. 86A). Subsequently, the trial court permitted implementation of the board's second submitted plan, which required mandatory reassignment of approximately 40,000 students and extensive transpor-

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[1] At the time of trial, the district was the largest in the State of California, encompassing an area of 711 square miles and having an enrollment of 650,000 students (Pet. App. 23A). Of these, 53.6% were white, 22.6% black, 20% Hispanic, and 3.8% Asian, American Indian or other (*ibid.*). "[T]he bulk of minority pupils attended schools having well above 50 percent combined minority enrollment, and the bulk of white pupils attended schools having well above 50 percent white enrollment" (*id.* at 24A to 25A). In October 1980, the district's student population was 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian, American Indian or other (*id.* at 23A, n.2). Approximately 16% of the student population in grades K-3 was white (*ibid.*).

tation (Pet. App. 86A to 87A).[2] In the fall of 1978, the plan was put into effect (Pet. App. 4A to 5A). By the fall of 1979, all parties wanted the plan discontinued (*ibid.*).[3] In October 1979, the trial court began hearings for the purpose of considering alternatives (Pet. App. 88A).

2. In March 1979, the state legislature approved, and, in November 1979, the voters of the State of California, by a more than two-to-one margin, ratified state constitutional amendment Proposition 1 (Pet. App. 5A).[4] The

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[2] During the summer of 1978, prior to the plan's utilization, a community organization named Bustop, Inc., intervened in the case and moved to stay its implementation, contending, *inter alia*, that the plan violated a federal right of parents and school children to be "free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy" (*Bustop, Inc.* v. *Board of Education*, 439 U.S. 1380, 1382 (1978)). A stay was denied in the trial court, granted by the court of appeal, but summarily vacated by the California Supreme Court (Op. Cert. 3). A stay was also denied in this Court. *Bustop, Inc.* v. *Board of Education*, 439 U.S. at 1383 (Rehnquist, J., on application for stay) ("While I have the gravest doubts that the [California] Supreme Court was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that Constitution to take such action.") Accord *Bustop, Inc.* v. *Board of Education*, 439 U.S. 1384 (1978) (Powell, J., on reapplication for stay).

[3] A mutual complaint was that the plan subjected some children to daily bus rides lasting two to four hours. See Comment, 10 Golden Gate L. Rev. 611, 675 n.315 (1980).

According to the director of Californians Against Proposition 1, a former public relations representative for the chapter of the American Civil Liberties Union participating in the Los Angeles case, the plan was "irrational and absurd" (*S.F. Examiner & Chronicle*, Oct. 7, 1979, § A, at 6, col. 1). She charged at the time that the plan "maximizes inconvenience and anxiety and minimizes integration" (*id.* at 2).

[4] Under California law, an amendment to the state constitution may be proposed either by an initiative petition (Cal. Const. art. 2, § 8; art. 18, § 3) or, as in the case of Proposition 1, by a two-thirds vote of each house of the state legislature (art. 18, § 1). A proposed amendment becomes effective if, like Proposition

Proposition amends the California constitution to provide that in assigning and transporting students, state and local officials are subject to no state constitutional "obli-

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1, it is approved by a majority of voters at a statewide election (art. 18, § 4).

Proposition 1 was introduced in the California legislature on December 4, 1978 by a state senator representing a portion of Los Angeles (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 611, 675 n.317). Unlike similar resolutions which had been unsuccessfully introduced by the senator in the past (*id.* at 611-612), Proposition 1 won quick legislative approval. It was widely reported that, as the senator concluded, "[t]he whole legislative thing turned around" as a result of indications that the trial court in this case was considering implementation of a massive multidistrict racial balancing plan (*id.* at 612, 676 n.328). See Comment, 75 Nw. L. Rev. 685, 691 (1980) (in the fall of 1978, the trial judge was advised by court-appointed experts that, because of Los Angeles' diminishing white student population, effective integration of the district's schools would require a "metropolitan" busing plan involving more than 100 suburban school districts not then parties to the suit). See also Comment, 26 U.C.L.A. L. Rev. 1183, 1193 (1979).

On January 18, 1979, the state senate approved the Proposition by a vote of 31 to 5 (Comment, *supra*, 75 Nw. L. Rev. at 691). On March 22, 1979, after a debate which "consisted primarily of anti-busing sentiments and counter charges of racism" (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 678), the Proposition passed the state assembly by a vote of 62 to 17 (Comment, *supra*, 75 Nw. L. Rev. at 691). The legislature subsequently scheduled the Proposition and three other measures, including a highly controversial constitutional amendment to limit government spending, for submission to the state's voters at a special November 1979 election (*id.* at 692 n.51).

According to news reports, the ensuing campaign for the Proposition was "low key, low budget and low visibility" (*S.F. Examiner & Chronicle*, Nov. 4, 1979, § A, at 6, col. 1). The proponents of the Proposition consistently denied any opposition to racial integration (Comment, *supra*, note 3, 10 Golden Gate L. Rev. at 659). They insisted that integration was not the issue. They stressed the advantages of neighborhood schools (*S.F. Examiner & Chronicle*, Oct. 7, 1979, *supra*) and the disadvantages of court-ordered busing, which they called "neither educationally sound nor sociologically effective" (*L.A. Times*, June 19, 1979, § 1, at 3, col. 5).

In the official California Ballot Pamphlet distributed to voters prior to the election, the Proposition's sponsor stated that "the

gations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution" (Cal. Const. art. 1, § 7(a)). The Proposition therefore prohibits state courts from imposing on state or local officials any state constitutional obligation or responsibility to assign or transport students "unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy [a] specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution" (*ibid.*).[5]

On November 15, 1979, the school board requested the trial court, pursuant to Proposition 1, to "hold a hearing to determine whether a federal court, sitting today, would find a *de jure* violation and impose a remedy involving pupil school assignment or pupil transportation" (Pet. App. 9A; Op. Cert. 4).[6] The plaintiffs responded with a

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intent and purpose of my amendment is to prohibit any California judge from ordering mandatory busing unless the busing is required by federal law" (Comment, *supra* 75 Nw. L. Rev. at 731 n.301). He explained that the Proposition is "based on the conclusion that forced busing is *not* a useful tool in achieving desegregation" (Comment, *supra* note 3, 10 Golden Gate L. Rev. at 660). Court-ordered busing, he stated "stands in the way of community support for voluntary integration" (*ibid.*).

[5] The Proposition, however, further provides that (Cal. Const. art. 1, § 7(a)):

> Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

At the time of the Proposition's enactment, a number of California school districts—including those in San Francisco, Berkeley, El Centro and Fresno—voluntarily operated mandatory, non-neighborhood racial balancing plans. *S.F. Examiner & Chronicle*, Mar. 23, 1979, § 1, at 6, col. 3.

[6] The school board relied on a section of the Proposition providing that (Cal. Const. art. 1, § 7(a)):

> Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other

request that the trial court declare Proposition 1 unconstitutional (Pet. App. 83A).

In May 1980, after completion of the desegregation plan hearings begun in October 1979, the trial court issued an opinion (Pet. App. 76A to 93A) concluding that Proposition 1 had no bearing on the case before it (*id.* at 79A to 80A, 92A to 93A). Relying on its 1970 finding that the school board was guilty of de jure segregation, the court concluded that "[t]he [1970] mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions" (*id.* at 77A to 80A, 84A to 85A, 90A to 93A). In July 1980, the court entered an order directing the school board to immediately implement a revised racial balancing plan (*id.* at 10A). The revised plan, like the one previously implemented, required extensive mandatory pupil reassignments and transportation (*ibid.*). Both the school board and petitioners appealed to the state court of appeal.[7]

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order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

At the time of the Proposition's enactment, thirteen California school districts were operating under state court-ordered or approved racial balancing plans (Comment, *supra* note 4, 75 Nw. L. Rev. at 690).

[7] With the new school year approaching and the appeals pending, the school board applied to the California court of appeal for an extraordinary writ of mandamus staying implementation of the new plan (*Board of Education* v. *Superior Court*, 448 U.S. 1343-1344 (1980)). The court of appeal ordered that consideration of the appeals be expedited and, in the meantime, partially stayed implementation of the plan insofar as it relied on a numerical quota defining desegregated schools and required mandatory busing of students currently attending substantially desegregated schools (*ibid.*). The court denied a stay in all other respects (*ibid.*). The California Supreme Court also denied a stay, recommending only

4. On appeal, the trial court's May and July orders were vacated and the case was remanded for further proceedings (Pet. App. 70A to 71A). In an opinion issued December 19, 1980, the California court of appeal found that the trial court had erred in finding Proposition 1 inapplicable to the case (Pet. App. 11A to 49A). The court concluded (1) that the trial court's 1970 findings did not support the conclusion that racial imbalance in Los Angeles schools was the result of a federal equal protection violation,[8] (2) that federal courts therefore would not be authorized to require mandatory student transportation to remedy the imbalance, and (3) that, as a result, Proposition 1 prohibits state court imposition on the Los Angeles school board of an obligation to assign or transport students (*id.* at 48A to 49A).

The court of appeal also concluded that Proposition 1 does not violate the federal constitution (Pet. App. 69A

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that the court of appeal further expedite consideration of the appeals (*ibid.*). Justice Rehnquist denied a stay, *Board of Education* v. *Superior Court, supra*, and in September 1980 the school district opened the school year under the new plan (Op. Cert. 5).

[8] According to the court of appeal, "[t]he thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to *de jure* segregation in violation of the Fourteenth Amendment" (Pet. App. 35A). The court of appeal held that this conclusion was incorrect as a matter of law (*id.* at 37A). The court concluded from a review of the decisions of this Court that (*id.* at 31A):

> the federal Constitution only authorizes court assignment and transportation of pupils on the basis of race when there has been state action which intentionally segregated with discriminatory purpose. If no such state action has occurred, elimination or alleviation of racial segregation which has resulted from economic causes and from neighborhood residential pattern is a matter left to local school authorities.

The court stated (*id.* at 34A to 35A) that "[w]hen the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found." The petitioners do not challenge this correction by the court of appeal of the trial court's finding (Pet. i-ii).

to 70A). The court discussed and rejected the plaintiffs' contentions (*id.* at 56A) that the Proposition "removes a previously given state right" in violation of the Equal Protection Clause, as interpreted by this Court in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967) and *Hunter* v. *Erickson*, 393 U.S. 385 (1969), "reflects intent to segregate with discriminatory purpose" in violation of the Equal Protection Clause, or "retroactively divests plaintiffs of adjudicated rights" in violation of the Due Process Clause (*id.* at 50A to 69A). On March 1, 1981, the California Supreme Court denied hearing (Pet. App. 73A), at which time the court of appeals' decision became final under state law. See Cal. Cts. App. and Sup. Ct. R. 24, 25.[9]

SUMMARY OF ARGUMENT

Proposition 1 modifies a state constitutional provision that goes beyond the requirements of the Equal Protection Clause. Since the repeal or modification of existing state procedural or substantive rights is unconstitutional only

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[9] The desegregation plan that had been implemented in September 1980 was terminated almost immediately thereafter. After an unsuccessful attempt by petitioners to convince either the trial court, the state court of appeal, or the state supreme court to enjoin this termination, an action seeking such an injunction was filed in the United States District Court for the Central District of California. That court concluded on the basis of the state trial court's 1970 findings that petitioners had shown there was a fair chance they could prove federally offensive de jure segregation. It rejected res judicata and abstention arguments and issued a temporary restraining order preventing the plan's termination. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 513 F. Supp. 717 (C.D. Cal. 1981). This order was vacated a day later by a divided panel of the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District* v. *District Court*, 650 F.2d 1004 (9th Cir. 1981). On remand, the district court denied the plaintiffs' motion for a preliminary injunction (Op. Cert. 7). The court also denied the school board's motion to dismiss the case on the grounds of abstention and res judicata. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 518 F. Supp. 1053 (C.D. Cal. 1981). This latter denial has been certified by the district court for interlocutory appeal (Op. Cert. 7). See 28 U.S.C. 1292(b).

if those rights are "required in the first place by the Fourteenth Amendment," *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979), Proposition 1 does not run afoul of the proscriptions of the Equal Protection Clause.

Proposition 1, moreover, does not classify persons according to race or impose "special burdens" on racial minorities within the meaning of *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969). While Proposition 1 deals with a racial issue, it does not categorize California citizens along racial lines. The class allegedly disadvantaged by the enactment is not racially identifiable. Likewise, the Proposition does not impose "special burdens" upon racial minorities because following the enactment of Proposition 1, those minorities possess greater substantive and procedural rights under California law than are mandated by the Fourteenth Amendment. *Hunter* v. *Erickson*, *supra*, does not extend so far as to classify as a "special burden" a state action that places minorities in a more advantageous position than is required by the Equal Protection Clause.

Finally, Proposition 1 was not motivated by a discriminatory purpose. There is no evidence that Proposition 1 bears more heavily on racial minorities than on the majority. The motive force behind Proposition 1, as found by the court of appeal, was the desire of state voters, among other things, to conserve financial resources, maximize educational opportunities and enhance public participation in the educational process. Neither the impact, the sequence of events leading to its adoption, the substantive and procedural background, nor the legislative history of Proposition 1 raises an inference that the Proposition was motivated by other than a race-neutral belief in the advantages for all races of neighborhood schools. The finding of the state court on this question deserves substantial deference, for as this Court has noted in another case involving a California constitutional amendment, state courts are in an advantageous position to understand the circumstances concerning the motiva-

tion and potential impact of a challenged enactment. *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967).

ARGUMENT

Proposition 1 expresses California's decision to limit judicial imposition of mandatory pupil assignment and transportation to school desegregation suits involving a violation of the Equal Protection Clause of the Fourteenth Amendment. Petitioners challenge this policy as being itself violative of the Equal Protection Clause. They argue that the Proposition creates an explicit racial classification and was motivated by a discriminatory purpose. The court of appeal correctly concluded that petitioners' arguments have no merit.

I. MODIFICATION OF STATE LAW GOING BEYOND THE REQUIREMENTS OF THE EQUAL PROTECTION CLAUSE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT

At least since 1976, when the California Supreme Court rendered its opinion in an earlier phase of this case, the state constitution has been interpreted as imposing upon California public school boards an affirmative duty "to take reasonably feasible steps to alleviate school segregation, whether such segregation is de jure or de facto in nature" (17 Cal. 3d at 289). In the performance of this duty, school boards were obligated to consider and implement mandatory student transportation whenever both "reasonably feasible" and necessary to produce "meaningful progress" toward alleviation of racial isolation (*id.* at 305-306, 309-310). As the court of appeal determined, Proposition 1 narrows this obligation: only if a federal court would be authorized under the United States Constitution to order busing (*e.g.*, where racial imbalance is de jure in nature), are school boards obligated to consider its use and state courts permitted to require it.[10]

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[10] The California constitutional provision amended by Proposition 1 now states (Cal. Const. art. 1, § 7(a)):

> nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity,

Had California, like most other states, initially chosen to limit the state constitutional obligation to alleviate racial segregation to that imposed by the Fourteenth Amendment, its choice could hardly be assailed as unconstitutional. Petitioners do not contend otherwise. Rather, petitioners apparently assert that because California initially chose to impose a state constitutional desegregation obligation beyond that mandated by the Fourteenth Amendment, Proposition 1's subsequent limitation or modification of that obligation violates the Equal Protection Clause. As the court of appeal concluded (Pet. App. 62A to 63A), however, this argument is meritless.

This Court has long recognized that the Equal Protection Clause is not offended by the "mere repeal" of existing state ordinances or legislation going beyond the protections afforded by the United States Constitution. *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 376 (1967). See also *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531 n.5 (1979) (*Dayton II*) ("rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment"). To establish a presumption to the contrary would be both constitutionally unwarranted and unwise. As this Court has frequently observed, much of the genius of our federal system lies in the opportunity it affords each state, if its people so choose, to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See, *e.g.*, *Reeves*,

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board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of public school assignment or pupil transportation.

Accordingly, the provision further states that courts of the state, in enforcing the state constitution, are prohibited from ordering the assignment or transportation of students unless such an order could be entered by a federal court to remedy a federal equal protection violation (*ibid.*).

Inc. v. *Stake*, 447 U.S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U.S. 589, 597 (1977); *Fay* v. *New York*, 332 U.S. 261, 296 (1947). Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 50 (1973) ("No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education"). Inherent in all experimentation is the possibility of failure. A presumption that restricted the ability of a state to abandon or modify an experiment that it concluded was not working—as California has with respect to its experiment with busing to alleviate de facto racial segregation—would substantially inhibit any initial willingness to experiment.[11] Proposition 1 reflects a decision by the state's voters that California school boards should be judicially denied the discretion to use alternatives to mandatory busing only when the racial isolation to be alleviated is the product of intentional segregation. The state concluded, based on considerable practical experience, that public school children, their parents, and the community as a whole derive substantial benefits from neighborhood schools,[12] regardless of their racial makeup, and that, in the absence of intentional segregation, mandatory transportation beyond such schools does not pro-

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[11] See *Palmer* v. *Thompson*, 403 U.S. 217, 228 (1971) (Burger, C.J., concurring) ("To hold * * * that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped * * *, would plainly discourage the expansion and enlargement of needed services in the long run").

[12] Proposition 1 provides in pertinent part (Cal. Const. art. 1, § 7(a)):

> In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

duce sufficient countervailing benefits for either the racial minority or majority to justify requiring its use as a matter of state constitutional law. This conclusion is not inherently discriminatory.[13] And far from ever intimating that such a conclusion is constitutionally suspect, this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 (1971), unanimously stated that "[a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." [14]

Of course, a state's repeal of existing law, even if its initial enactment was not constitutionally required, is constitutionally suspect if it either creates a racial clas-

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[13] Congress reached a similar conclusion in enacting the Equal Education Opportunities Act of 1974, wherein it declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. 1701(a)(2). See also 20 U.S.C. 1714(a) ("No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student"); *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980); *Morales* v. *Shannon*, 516 F.2d 411 (5th Cir.), cert. denied, 423 U.S. 1034 (1975); *Brinkman* v. *Gilligan*, 518 F.2d 853 (6th Cir.), cert. denied, 423 U.S. 1000 (1975).

[14] Notwithstanding the difficulties that a neighborhood school policy poses to the alleviation of racial isolation resulting from residential patterns, utilization of such a policy by a school district has never been held to constitute a per se violation of the Equal Protection Clause. *Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *id.* at 991 n.1 (Powell, J., concurring); *Diaz* v. *San Jose Unified School District*, 612 F.2d 411, 412 (9th Cir. 1979) ("[a] neighborhood school policy is not constitutionally suspect"); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977) (official discriminatory intent cannot be inferred solely from school board's use of a neighborhood school policy); *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1049 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 60-61 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967).

sification or, though facially neutral, serves as a subterfuge for intentional racial discrimination. As demonstrated below, however, Proposition 1 suffers from neither of these constitutional defects.

II. PROPOSITION 1 DOES NOT CREATE AN IMPERMISSIBLE RACIAL CLASSIFICATION

Relying on this Court's decision in *Hunter* v. *Erikson*, 393 U.S. 385 (1969), petitioners contend that Proposition 1 embodies an "explicitly racial classification" that is not warranted by a compelling state interest. In *Hunter*, the Court upheld an equal protection challenge to a city charter amendment requiring referendum approval by the city's voters of any ordinance forbidding discrimination "on the basis of race, religion, national origin or ancestry" in the sale or rental of real estate. Housing ordinances dealing with other issues were not affected by the charter amendment and thus would become effective merely upon approval by the city council. As the *Hunter* Court expressly and repeatedly recognized, the "explicitly racial classification" (393 U.S. at 389) created by the city charter amendment was between "those who sought protection against racial bias" (*id.* at 390) in the housing market—who are by definition racial minorities, for the racial "majority needs no protection against discrimination" (*id.* at 391)—and "those who sought to regulate real property transactions in the pursuit of other ends" (*id.* at 390). Only the former class was required under the charter amendment to secure the referendum approval of the community's electorate in addition to the approval of the city council.

Petitioners argue that Proposition 1 runs afoul of *Hunter* because it removes a single judicial remedy, mandatory student assignment and transportation, from the arsenal of techniques available to a state court to enforce a school board's state constitutional duty to alleviate de facto racial segregation, but permits courts to order busing "for any other purpose—such as relieving overcrowded schools or fulfilling the educational rights of

handicapped children" (Pet. Br. 45 n.25). By establishing a "race-specific" bar to court-ordered busing, Proposition 1 creates, according to petitioners, "a two-track system of law-enforcement, under which the state's laws against racial segregation in schooling, however privately caused, are harder to enforce than are the state's laws addressing other schooling questions * * *" (*id.* at 31-32). Under petitioners' analysis, therefore, the classification created by Proposition 1 is between (1) those seeking court-ordered busing to enforce the state constitutional right "to attend a school where the school board has performed its duty to take all reasonable steps to alleviate [de facto] segregation" (Pet. App. 66a), and (2) those seeking court-ordered busing to enforce any other right recognized under California state law. While Proposition 1 is indeed "race-specific" in the sense that its obvious concern is the issue of racial isolation in California public schools, it simply does not create, contrary to petitioner's contention, a classification drawn along racial lines.[15]

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[15] Contrary to the apparent position of petitioners (Pet. Br. 35), Proposition 1 is not a constitutionally suspect racial classification for the sole reason that it impacts upon an area of traditionally high minority concern—school segregation. The decisions of this Court make plain that in determining whether or not a legislative classification is racial and thus constitutionally suspect, the question is not whether the classification addresses a racial issue but rather whether it creates or "rests" on distinctions based on race. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979); *James* v. *Valtierra*, 402 U.S. 137, 141 (1971); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Brown* v. *Board of Education*, 347 U.S. 483, 490 (1954). The classification embodied in Proposition 1 rests upon no such distinction.

Moreover, Proposition 1 is not "directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegregating the public schools" (Pet. Br. 45 n.25). It does not leave "[m]andatory student assignment for any other purpose * * * untouched" (*ibid.*). By its terms, Proposition 1 removes any state constitutional obligation to bus for any reason (such as to relieve school overcrowding) except where necessary to rectify a violation of the Equal Protection Clause. See Cal. Const. art. 1, § 7 (a) (emphasis added) (*"nothing contained herein*

Nothing in the record of this case suggests, and there is no reason to assume, that the allegedly disadvantaged class—that is, the class of persons seeking court-ordered busing to enforce a school board's state constitutional duty to alleviate de facto segregation—is a racial minority or is in any way racially identifiable. The policy question that lies at the heart of Proposition 1—whether California courts should be permitted to override the discretion of local school districts and order mandatory pupil transportation to alleviate de facto racial isolation—does not split the California citizenry into racial categories. As California's experience suggests, establishing or maintaining the state courts' authority to order mandatory pupil transportation to alleviate de facto racial isolation is not exclusively the preference of racial minorities.[16] Conversely, vesting local school boards with the discretion to employ measures short of mandatory busing to alleviate de facto racial imbalance is not exclusively the preference of the racial majority. Furthermore, the benefits arising from such a policy, such as increased community support and input, enhanced safety, reduced costs and improved home-school relations (see note 12, *infra*), flow to students and

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or elsewhere in this Constitution imposes upon the State of California or any public entity * * * any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation"). Just as the Proposition does not foreclose the possibility that school boards may be required to implement and state courts to enforce a *statutory* obligation to bus unrelated to school desegregation, nothing in the Proposition prevents California from imposing and California state courts from enforcing a statutory obligation to bus for the purpose of alleviating racial imbalance. All the Proposition does is remove any state constitutional obligation to bus—it does not prevent the state legislature from requiring such action as a matter of social policy.

[16] As noted by the 1976 opinion of the California Supreme Court in this case, alleviation of racial isolation, whether it arises from intentional discrimination or not, benefits "all students, both black and white" (17 Cal. 3d at 303 n.15; citations omitted).

parents of all races. See generally *Keyes* v. *School District No. 1*, 413 U.S. 189, 245-246 (1973) (Powell, J., concurring). As we showed in *Washington* v. *Seattle School District No. 1*, No. 81-9, Brief for the United States at 16-18 & nn. 12 & 42 [hereinafter cited as *Seattle Brief*], significant segments of both the racial majority and minority lie on either side of busing controversies. California's effort to deal with a racial issue, therefore, is not ipso facto a prohibited racial classification. As this Court has made clear (see cases cited in note 15, *supra*), the constitutional prohibition is against racial *classifications*; there is no blanket interdiction against all state attempts to deal with racial issues.

III. PROPOSITION 1 DOES NOT IMPOSE SPECIAL BURDENS ON RACIAL MINORITIES

Petitioners contend that Proposition 1 violates the Equal Protection Clause by placing "special burdens on racial minorities within the governmental process" unjustified by a compelling state interest. *Hunter* v. *Erikson*, *supra*, 393 U.S. at 391-392. See also *Gordon* v. *Lance*, 403 U.S. 1, 5 (1971); *James* v. *Valtierra*, 402 U.S. 137, 140-141 (1971). Petitioners contend (Pet. Br. 44-50) that Proposition 1 singles out a right afforded California school children under state law to attend schools free of racial isolation, whatever the isolation's cause, and subjects that right to an unusual judicial process that makes protection of the right substantially more difficult than protection of other state rights. The argument, though ingenious, should be rejected.

Initially, the essential premise of petitioners' analysis (namely, that Proposition 1 effects the "rifle-shot' removal of a remedy previously available to vindicate a state constitutional right, while leaving the underlying right intact) disregards the clear language of the Proposition, which rescinds not merely a remedy, but "any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to

the use of pupil school assignment or pupil transportation" (Cal. Const. art. 1, § 7(a)). Although the court of appeal's opinion contains language arguably supportive of petitioners' right-remedy distinction, the lower court's ultimate conclusion regarding the effect of Proposition 1 is consistent with the amendment's plain language: "In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by decisions of the United States Supreme Court, [Proposition 1] merely provides a more precise contour to the duty established by California law and court decisions to desegregate public schools regardless of cause" (Pet. App. 69A). Thus, while the court of appeal's discussion on this point is ambiguous at best, the court's opinion can be reconciled with the apparent plain meaning of Proposition 1, *i.e.*, that it not only restricts the use of a particular remedial technique, but also redefines the underlying substantive right to alleviation of de facto racial segregation in the public schools.

Furthermore, even assuming, as petitioners contend, that Proposition 1 does remove one remedy for a state constitutional right while leaving the right intact (Pet. Br. 35-36), elimination of that remedy in no way imposes a "special burden" on racial minorities that is prohibited by the Fourteenth Amendment. Under petitioners' reading of Proposition 1 (Pet. Br. 38-42), all courts in California, both state and federal, have clear authority to enforce the demands of the Fourteenth Amendment, and local school boards have a well-defined duty to go beyond those requirements to eliminate de facto racial segregation by all reasonably feasible means. State courts, furthermore, can use any mechanism short of mandatory pupil transportation to enforce this obligation imposed upon the school boards (Pet. App. 55A). In sum, California law—even after Proposition 1—provides racial minorities with more substantive and procedural rights than are afforded them under the federal Constitution. *Hunter* v. *Erickson*, *supra*, clearly does

not extend so far as to classify as a "special burden" *any* state action that leaves racial minorities with more protection than is mandated by the Equal Protection Clause.[17]

Petitioners' related claim that Proposition 1 constitutes "racial discrimination in the judicial apparatus of the state" (Pet. Br. 48) because it leaves a state constitutional right without a remedy is likewise groundless. Although Proposition 1 limits the availability of court-ordered busing to cases involving violations of the Fourteenth Amendment, it does not leave state constitutional rights unremedied. Even assuming that busing is highly effective in eliminating de facto desegregation, busing is still only one of "virtually scores of administrative techniques for facilitating the desegregation of school systems" (17 Cal. 3d at 305 130 Cal. Rptr. at 740). "All the amendment does is remove from the courts the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation" (Pet. App. 67A). Statutes, even in the area of civil rights, typically make available only a limited number of remedies for violations of their proscriptions, often withholding the most effective remedies in favor of others that promise to be less disruptive. Under Title VII of the Civil Rights Act of 1964, for example, a victim of a discriminatory employment practice is entitled only to back pay and injunctive relief, not to damages generally. 42 U.S.C. 2000e-5(g). Title VIII limits punitive damages for victims of fair housing violations to not more than $1,000. 42 U.S.C. 3612(c). Such limitations, and the burdens

[17] If, prior to Proposition 1, California had restricted the state constitutional obligation to desegregate schools to the contours of the Fourteenth Amendment, the effect of Proposition 1 as interpreted by petitioners would be to expand state constitutional protection of racial minorities. Such an "expansion" could hardly be termed a violation of the Equal Protection Clause. It is difficult to conceive how the same substantive result can violate the Fourteenth Amendment simply because it was achieved by first further expanding and then modifying state constitutional obligations.

that they place on litigants, cannot be characterized as unusual or "special" within the meaning of *Hunter* v. *Erickson*, *supra*. Nor can they be presumed to rest on distinctions based on race.[18] See *James* v. *Valtierra*, *supra*, 402 U.S. at 141 (emphasizing this requirement as the rationale of *Hunter* v. *Erickson*, *supra*).

In addition to the foregoing, petitioners' *Hunter* v. *Erickson* argument significantly exaggerates Proposition 1's impact on California law. Prior to the Proposition's enactment, school children in California did not enjoy an absolute right to attend schools free of racial isolation, nor did they enjoy a right to court-ordered pupil assignment and transportation wherever such schools did not exist. The California Supreme Court declared that school boards have a state constitutional duty "to attempt to alleviate school segregation regardless of its cause" (17 Cal. 3d at 293), but emphasized that there is no "constitutional command that each school in a district must reflect the racial composition of the district as a whole" (*id.* at 302).[19] A school board's only obligation is to take the "reasonably feasible steps to alleviate school segregation" that will "produce meaningful progress in the

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[18] Indeed, petitioners concede that "[f]ew persons contend today that opposition to court-ordered desegregation programs like the ones here dismantled or precluded by Proposition 1 is entirely single-minded, that its only motive is racially discriminatory in character" (Pet. Br. 96).

[19] The court specifically reversed the trial court's holding that the state constitution obligated a school district " 'to use and exercise its powers and authority * * * so as to achieve, as closely as * * * good faith and fair dealing will reasonably enable and allow it to do, *integration* and *racial balance* in each of its schools so as to have a unitary school system.' (Italics added.)" (17 Cal. 3d at 302 n.12). The court explained that "from a constitutional standpoint, we see nothing inherently invalid in the fact that percentages of various racial or ethnic groups may vary, even significantly, in different schools throughout a school district, or even that a particular minority group may be completely unrepresented in a particular school" (*id.* at 304).

alleviation of such segregation and its harmful consequences" (*id.* at 305-306).[20] The California Supreme Court did not hold that busing is a necessary incident of the "meaningful progress" required by the state constitution, but to the contrary suggested that local school boards could fulfill their state constitutional obligation by " 'integrative gerrymandering' " of attendance zones (*id.* at 307), by making decisions as to the location, size, grade categories and feeder patterns of new schools "with an eye toward promoting desegregation" (*ibid.*), and by implementing voluntary majority-to-minority transfer programs (*id.* at 308).[21] More specifically, the court

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[20] The court noted that the task of desegregation "is an extremely complex one" (17 Cal. 3d at 286) that often poses "grave practical difficulties" (*id.* at 304), and stressed that "the fastest path to desegregation does not always achieve the consummation of the constitutional objective; it may instead result in resegregation" (*id.* at 286). The court held that where a school board was fulfilling its obligation to take "reasonably feasible steps" and was producing "meaningful progress," a court "should not step in even if it believes that alternative desegregation techniques may produce more rapid desegregation in the district" (*id.* at 305-306). The court stated that "plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope" (*id.* at 286), concluding that judicial intervention into such plans was inappropriate where "a court has reason to be confident that the constitutional rights of minorities are not being ignored" (*id.* at 306).

[21] The court noted that busing is only one of the "virtually scores" (17 Cal. 3d at 305) of alternative desegregation techniques available to school boards in fulfilling their obligation to make meaningful progress in the alleviation of racial segregation (*id.* at 309). Busing "is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field" (*id.* at 309). The court did not hold that busing should either be generally utilized by school boards or ordered by courts to alleviate racial segregation. The court concluded that the use or ordering of busing in any circumstance is appropriate only where "reasonably feasible" (*id.* at 310). "[I]n some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable" (*id.* at 309).

did not hold or suggest that implementation of a busing remedy in Los Angeles was either "reasonably feasible" or required as a matter of state law.[22] In short, prior to Proposition 1, petitioners had no secure state constitutional right to court-ordered busing in any instance where racial imbalance (not resulting from intentional segregation) occurred within a state school system. Proposition 1, therefore, which permits court-ordered mandatory busing when required by the Fourteenth Amendment and otherwise does not interfere with the discretion of local school boards regarding its use, does not impose any "special burdens" on racial minorities analogous to those invalidated in *Hunter* v. *Erickson, supra.*[23]

IV. PROPOSITION 1 WAS NOT MOTIVATED BY A DISCRIMINATORY PURPOSE

Petitioners contend (Pet. Br. 64-65) that regardless of the sufficiency of their racial classification arguments,

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[22] As the history of this litigation indicates, a strong case may be made that busing in Los Angeles is not "reasonably feasible." Clearly, the "costs" of busing throughout the far flung Los Angeles school district are extremely high "both in financial and educational terms" (17 Cal. 3d at 309).

[23] The court of appeal also properly rejected the petitioners' contention, raised in this Court in their petition for a writ of certiorari but not in their brief on the merits, that Proposition 1 violates this Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369 (1969). In *Reitman*, the Court affirmed the holding of the California Supreme Court that a state constitutional amendment guaranteeing a private right to discriminate in the sale or rental of real property "significantly encourage[d] and involve[d] the State in private discriminations" and thus violated the Equal Protection Clause (*id.* at 381). See also *Palmer* v. *Thompson*, 403 U.S. 217, 233-234 (1971).

Unlike the state constitutional amendment at issue in *Reitman*, however, Proposition 1 does not address at all the ability of the state to regulate private discrimination. Nor does it remove from school authorities in the state the obligation to avoid and redress racial isolation in schools caused by their own discrimination. Indeed, under the Proposition, California school boards retain an affirmative obligation, beyond that mandated by the Fourteenth Amendment, to take steps to alleviate racial isolation, whatever its cause (Pet. App. 55A).

Proposition 1 is unconstitutional because it was motivated by an improper discriminatory purpose. The California court of appeal properly rejected this argument.

In determining whether Proposition 1 was motivated by a discriminatory purpose, the inquiry becomes whether the measure has a disparate adverse impact upon a racial minority, and if so, whether that impact can be traced to a discriminatory purpose. *E.g., Personnel Administrator of Massachusetts* v. *Feeney, supra.* Contrary to the assertions of petitioners (Pet. Br. 71-80), there is no evidence in this record that Proposition 1 "bears more heavily on one race than another'" (*Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977), much less that any adverse consequences for minorities are "inevitable" (Pet. Br. 71). Petitioners' contention that Proposition 1 visits a disproportionate impact on racial minorities attending Los Angeles public schools overlooks the fact that the majority of students attending Los Angeles public schools belong to minority racial groups—only 23.7% of the total student population and 16.1% of grades K-3 are white. By arguing that anything which "frustrate[s] imposition of a program using mandatory reassignment" necessarily results in adverse effects "felt principally by minorities" (Pet. Br. 79), petitioners imply, as noted by the court of appeal, "that ethnic minority children, even though they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students" (Pet. App. 45A n.3).

Furthermore, there is no sound basis to infer that Proposition 1 will adversely affect any racial group—majority or minority. Proposition 1 does not eliminate the judicially enforceable state constitutional obligation of California school boards to take all reasonably feasible steps to alleviate segregation regardless of cause. This obligation is not, as petitioners assert, "'a promise to the ear to be broken to the hope'" (Pet. Br. 97) merely

because one remedial device—court-ordered mandatory busing—is available only to remedy purposeful discrimination. California courts retain broad remedial powers to enforce state desegregation law. See Pet. App. 55A.[24]

Even beyond the showing that Proposition 1 has no disproportionate and adverse impact on minority students, the evidence in the record of this case, as the court of appeal correctly concluded, is wholly inadequate to establish "that a [racially] based discriminatory purpose has, at least in some measure, shaped" Proposition 1. *Personnel Administrator of Massachusetts* v. *Feeney*, *supra* 442 U.S. at 276.

The motivating purposes behind the enactment of Proposition 1 are set forth in the provision itself.[25] These purposes, such as conservation of financial resources, maximization of educational opportunities, and enhancement of public participation in the educational process, provide no basis for inferring racial animus. Indeed, the stated goals of Proposition 1 essentially catalogue the race-neutral advantages of neighborhood schools, which inure to students and parents of all races. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 245-246 (1973) (Powell, J., concurring); *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 450-451 (1980) (Powell, J., dissenting). The state court of appeal would have been justified in rejecting this explicit statement of legislative purpose only if "an examination of the legislative scheme and its history demonstrate[d] that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Michael M.* v. *Superior Court*, 450 U.S. 464, 470 (1981) (Rehnquist, J., announcing judgment).

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[24] Moreover, Proposition 1 in no way interferes with a local school board's authority to permit any school assignment voluntarily sought by a student. Accordingly, any student attending a racially identifiable public school and seeking reassignment to a more integrated school need only secure the school board's approval to achieve his goal.

[25] See note 12, *supra*.

The court of appeal, however, properly dismissed as "pure speculation" the assertion that "the voters who supported Proposition 1's restrictions on mandatory school assignment by race of children outside their home areas were motivated by specific intent to effect racial segregation and by discriminatory purpose" (Pet. App. 64A).

Petitioners argue that notwithstanding the court of appeal's finding of racially neutral intent, this Court must find as a matter of law that Proposition 1 was motivated by racial animus. They contend that an analysis of the impact, sequence of events leading up to adoption, substantive and procedural departures from the norm, and legislative history of Proposition 1 clearly raise an inference of discriminatory purpose. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 266. A "sensitive inquiry" (*ibid.*) into these factors, however, confirms rather than weakens the conclusion of the state court below.

This Court has made clear that the existence and foreseeability of a disproportionate adverse impact on minorities do not in themselves establish an intent to discriminate against the affected minorities. In determining whether a challenged governmental action was at least partially motivated by discriminatory purpose, a finding that the action has discriminatory consequences is *relevant* only insofar as it appears that such consequences were actually anticipated, see *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464-465 (1979), and *decisive* only insofar as it appears that such consequences were "desired"—that is, "that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 & n.25. There is no such evidence in this case.

As petitioners pointed out (Pet. Br. 80-81), Proposition 1 was passed by the legislature and adopted by

the state electorate amid speculation that the trial court in this case was preparing to institute a racial balancing plan for the entire Los Angeles metropolitan area, entailing court ordered, non-neighborhood busing in more than 100 suburban school districts. Contrary to petitioners' arguments (*id.* at 81-82), however, this sequence of events does not raise per force an inference of discriminatory purpose. The desire of California voters to limit the availability of mandatory busing in the absence of a violation of the Equal Protection Clause is merely an expression of support for the maintenance of neighborhood schools. Since neighborhood schools provide substantial advantages to both minority and non-minority students, opposition to mandatory busing is not a litmus test for racial animus. The choice made by the voters of California is entirely consistent with a good faith belief that the advantages of a neighborhood school system outweigh the advantages of a racial balancing system—a preference reflected in the substantial support for Proposition 1 in the minority community itself.[26] Nor does implementation by a state's electorate of a policy favoring neighborhood schools, in and of itself, raise an inference of racial discrimination. *Austin Independent School District* v. *United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring); *United States* v. *Texas Education Agency*, 564 F.2d 162, 168 (5th Cir. 1977). See also *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U.S. 437, 450 (1980) (Powell, J., dissenting).

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[26] See J.A. 268-269 (statement of Mayor Tom Bradley) ("Most parents, whatever their color, whatever their background, wherever they live, don't want their kids transported back and forth across the city"). See also note 4, *supra*. Cf. our brief in *Seattle* at 43 & n.42.

Moreover, a state referendum cannot be said to have been motivated by a discriminatory purpose merely because some voters may have supported it for discriminatory reasons. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring); *City of Mobile* v. *Bolden*, 446 U.S. 55, 83-94 (1980) (Stevens, J., concurring in judgment).

Although petitioners labor mightily (Pet. Br. 83-88), they are unable to point to any significantly enlightening substantive or procedural departures from the norm in the enactment of Proposition 1. The fact that the Proposition was presented to the voters in a special election (*id.* at 84) is of little import in light of the fact that three other initiatives were also presented to state voters in that election. See note 4, *supra*. The further fact that Proposition 1 impacts upon a decision of the state supreme court (Pet. Br. 84) and modifies the remedial power of state courts (*id.* at 86) likewise is not a departure from but rather is the norm. See *People* v. *Frierson*, 25 Cal. 3d 142, 599 P.2d 587 158 Cal Rptr. 281 (1979) (upholding the constitutionality of Cal. Const. art. 1, § 27, which reversed a prior California Supreme Court decision regarding the constitutionality of the death penalty under state law). Finally, Proposition 1 does not sever "the link between right and remedy" (Pet. Br. 86); it leaves California courts with "scores of remedies available for use * * * to end racial isolation" (Pet. App. 67a).

The legislative history of Proposition 1, as already noted, is consistent with a racially neutral belief in the benefits of neighborhood schools. While petitioners make much of asserted past acts of discrimination by the State of California and the Los Angeles School Board, they ignore the fact that the campaign for Proposition 1 was "low key, low budget and low visibility" (*S.F. Examiner & Chronicle*, Nov. 4, 1979, § A, at 6, col. 1), with no appeals made to racist sentiment (note 4, *supra*). The historical acts of discrimination noted by petitioners (Pet. Br. 89-90), furthermore, do not indicate that the state electorate was motivated by racial animus in its adoption of Proposition 1. As was recently noted in *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1970) (Stewart, J., announcing judgment):

> [P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains

whether a discriminatory intent has been proven in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

The less than pristine history of official prejudice in California, as well as the alleged efforts of the Los Angeles School Board to "defeat integration" (Pet. Br. 90 n.51), do not require a finding that the voters of the State of California were racially motivated when they cast their ballots in favor of Proposition 1. See *City of Memphis* v. *Greene*, No. 79-1176 (Apr. 20, 1981), slip op. 16 n.27 (upholding city street closing challenged as discriminatorily motivated, despite a history of discriminatory provision of city services and "evidence that racial prejudice still exists in Memphis"). The state court of appeal, upon all the evidence adduced in this case, concluded that Proposition 1 was not passed with segregative intent or for a discriminatory purpose (Pet. App. 63A to 65A). This conclusion deserves substantial deference from this Court. Inquiries into legislative motives or purposes are at best "a hazardous matter," *United States* v. *O'Brien*, 391 U.S. 367, 383-384 (1968); *Palmer* v. *Thompson*, 403 U.S. 217, 224 (1971), and "the search for legislative purpose is often elusive," *McGinnis* v. *Royster*, 410 U.S. 263, 276-277 (1973). The difficulties increase exponentially where, as here, the inquiry requires examination of a decision made not just by a legislature but by the state electorate. While some intemperate remarks by individuals will almost inevitably enter into the public debate when the issue touches upon racial concerns or other sensitive areas, that circumstance should not in itself disable the people of a state from utilizing the referendum form of governmental process. This Court has properly cautioned judicial reluctance to impute improper purpose in such a context. *James* v. *Valtierra*, *supra*, 402 U.S. at 143. In this case the inquiry should be guided not only by general deference to the propriety of state lawmaking efforts by its people, but also by the specific determination of the court of

appeal that Proposition 1 was not animated by a discriminatory purpose. As this Court has previously recognized in another case involving a constitutional amendment adopted by California voters, state courts "armed * * * with the knowledge of the facts and circumstances concerning the passage and potential impact" of a challenged enactment are, as an institutional matter, better able than this Court to determine legislative purpose since they are "familiar with the milieu in which [the enactment] would operate." *Reitman* v. *Mulkey*, 387 U.S. 369, 378 (1967). The holding of the California Court of Appeal that Proposition 1 was not motivated by a discriminatory purpose should be affirmed.

CONCLUSION

The judgment of the court of appeal should be affirmed.

Respectfully submitted.

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OCTOBER TERM, 1981

MARY ELLEN CRAWFORD,
A MINOR, ETC., ET AL.,
PETITIONERS,
vs.
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, ET. AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

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Introduction.

Pursuant to Rule 35.3 of the Rules of this Court, petitioners Crawford et al., file this brief in reply to the Brief of Respondent Board of Education of the City of Los Angeles ("Res. Br.") and the Brief of Respondent Bustop. This reply brief is being filed within one week of March 22, 1982, the scheduled date of oral argument in this case.

With the filing of the briefs in defense of Proposition 1, it has become clear that, lacking justifications that could survive strict scrutiny, respondents and their supporters seek to obscure the racial character of the line Proposition 1 draws and of the results it designedly causes. This Court should reject that attempt.

I. Because Proposition 1 is "Undeniably a Classification Based on Race,"[1] it Must Fall Absent a Compelling Justification which Precisely Fits that Classification.

Neither of the respondents nor any of the *amici* filing briefs on their behalf offers anything resembling a compelling justification for the precise line drawn by Proposition 1. Yet that line is unmistakably race-specific, in several respects: under Proposition 1, *only the goal of desegregating minority schools* must be pursued without state judicial assistance in obtaining whatever pupil assignment or transportation may be needed to vindicate state constitutional rights; *only racial minorities* must prove *two* constitutional violations (both state *and* federal) to overcome the barrier created by Proposition 1 to the judicial ordering of potentially indispensable relief; and *only integration decrees* remain continually subject to challenge by "any interested person." *See* Pet. Br. at 42-48.

Unless Proposition 1's defenders can somehow show that, despite these race-specific features, "the classification on its face is racially neutral" after all, petitioners need not "establish an

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[1] *University of California Regents* v. *Bakke*, 438 U.S. 265, 289 (1978) (Powell, J., announcing judgment).

intent to discriminate" before triggering the demand for compelling justification:[2] with exceptions not relevant here, "[r]acial and ethnic distinctions *of any sort* are inherently suspect and thus call for the most exacting judicial examination."[3] For this reason, the board and its supporters labor mightily to recast Proposition 1 as a facially neutral measure. Petitioners address their several attempts in turn.

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[2] *Id.* n.27, contrasting *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-265 (1977).

[3] *Bakke*, 438 U.S. at 291 (Powell, J.) (emphasis added); *see also id.* at 294 n.34. *Accord, Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979) ("racial classification[s], regardless of purported motivation, [are] presumptively invalid and can be upheld only upon an extraordinary justification"). This proposition holds even with respect to classifications that operate within government's own processes, purport to be neutral, impose no direct burden on anyone's liberty, and apply to all races. *See, e.g., Anderson* v. *Martin*, 375 U.S. 399 (1964) (voiding state requirement that race of every candidate be designated on nominating papers and ballots).

Reduced scrutiny may, of course, be proper when the racial classification in question affects only an innocuous aspect of bureaucratic structure or record-keeping, as in *Tancil* v. *Woolls*, 379 U.S. 19 (1964) (per curiam), *aff'g* 230 F.Supp. 156 (E.D. Va. 1964) (upholding requirement that race of parties be recorded on divorce decrees). *Tancil* seems the strongest available support for *Brown* v. *Califano*, 627 F.2d 1221 (D.C. Cir. 1980), which upheld a change in the mechanisms available to the Department of Health, Education and Welfare (HEW) and the Department of Justice (DOJ), collectively, to assure that no federal funds go to segregated school districts. *Prior* to the change, HEW could condition continued funding on a district's adoption of a transportation remedy — subject to later judicial review of HEW's conclusion that desegregation required such a remedy. *After* the change, HEW still had an enforceable "obligation to assure no federal moneys support segregated schools," *id.* at 1236, and could still "initiate its administrative proceedings if busing [was] only one of multiple possible remedies for a noncomplying district," *id.* n.89, but would have to refer the matter to DOJ for immediate litigation if the district was one in which HEW believed *only* a transportation remedy would suffice. *Id.* at 1231-1233, 1235-1236. Thus, as the Government explained the narrow change at issue in *Brown*, it "merely replace[d] eventual judicial review of HEW action with initial resort to the courts for districts which HEW believes need a transportation remedy." *Id.* at 1236 n.89.

It has also been argued that "racial classifications designed to further remedial purposes" need only survive a form of scrutiny which, while beyond the minimal, is less than strict. *Bakke*, 438 U.S. at 358-359 (opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and

A. *Distorting the Actual Reach of Proposition 1 To Conceal its Race-Specific Scope.*

Making an argument never before advanced by anyone in this litigation, the board boldly states: "The classification that Proposition 1 makes among remedies is by no means racial. It plainly prohibits a state court from ordering *any* busing that is not required to remedy a Fourteenth Amendment violation, and neither its language nor the Attorney General's official ballot summary (J.A. 257-258) mentions either race or desegregation." (Res. Br. 37 n.24; emphasis added.) Quite apart from the concession of Proposition 1's author and chief sponsor that court-ordered "busing" is itself a "buzzword,"[4] the board's statement is simply false. For Proposition 1 (unlike, for example, Initiative 350, at issue in No. 81-9) *does* explicitly refer to matters of race — by providing that "[n]othing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a *school integration plan* . . . ." If the amendment's prohibition indeed applied to court-ordered "pupil school assignment or pupil transportation" *for any purpose whatever*, then this race-specific proviso would obviously make no sense.[5] Thus the board is more

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dissenting in part). *See also Fullilove* v. *Klutznick*, 448 U.S. 448, 482-484 (1980) (Burger, C.J., announcing judgment). But the classification in this case manifestly falls outside both the "plainly innocuous" and the "clearly remedial" categories.

[4] After Senator Robbins repeatedly employed the phrase "forced busing" on a campaign swing through Fresno, he was asked, "Isn't that a buzzword?" As reported by *The Fresno Bee*, Robbins replied, "Yes . . . . [t]hat's why we use it." J.A. 243.

[5] Proposition 1 would in that event assure that local school boards maintained authority to reassign or transport students in order to desegregate schools, without similarly assuring that like authority was retained by school boards to satisfy the educational needs of the handicapped, to relieve overcrowding, and to provide "distance" or "hazard" busing. Yet in many such situations — overcrowding, for instance — reassigning only those pupils who *ask* to be transported to non-neighborhood schools might prove as unfair and ineffective a solution as it does with respect to disproportionately minority schools in minority neighborhoods. It thus seems most unlikely that Proposi-

faithful to the actual reach of Proposition 1 when it concedes elsewhere that Proposition 1, as written and as construed by the court of appeal, deals "*only* [with] the power of a state court to order mandatory reassignment of students *as a remedy for . . . racial imbalance*." (Res. Br. 28; emphasis added.) *See also* Opposition to Cert. at 9. Indeed, never before has any proponent *or* opponent of Proposition 1 even intimated that the amendment might forbid court-ordered student assignment or transportation for purposes other than the relief of racial isolation.[6] Certainly no such meaning or intent was ever disclosed to the California voters who approved Proposition 1 — and who might well have been reluctant to deny handicapped children, children who live great distances from school, children who must traverse special hazards to reach school, or children at overcrowded schools, the ability to secure court-ordered reassignment remedies where local school boards proved unwilling to furnish transportation conceivably required by the California Constitution.[7]

Thus text, common understanding, and the authoritative construction below (Pet. Br. 35-36) converge: Proposition 1 embraced *only* student assignment and transportation *for the purpose of racial desegregation*.[8]

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tion 1 was meant to prevent school boards from reassigning and transporting pupils as the boards might deem necessary not solely to desegregate but in all these contexts. If Proposition 1's ban on judicial orders *compelling* school boards to adopt reassignment plans were truly to extend beyond desegregation, however, then the proviso would surely have read: "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a *pupil assignment or transportation plan* . . . ."

[6] Typical is this statement by the County of Los Angeles in its *amicus* brief on the board's behalf at 22: "Proposition 1 only changed the California law with regard to Court-ordered mandatory reassignment of pupils to remedy purely *de facto* segregation."

[7] California law specifically requires that ballot descriptions for all propositions placed before the electorate fully and fairly disclose to voters the nature of the measures presented to them. *See Amador Valley Joint Union High School District* v. *State Board of Equalization*, 22 Cal. 3d 208, 231, 243 (1978).

[8] The Analysis by Legislative Analyst, for example, concerns solely "segregation" and "desegregation;" the "Background" statement describes

B. *Misstating the Relation Between Proposition 1 and Pre-Existing California Law to Paint the Amendment's Racial Classification as a Mere Corollary of Repealing the Prior Law.*

Where a state has given racial minorities as such a right or remedy not required by the Fourteenth Amendment itself, the subsequent rescission of that step, without more, is by definition a race-specific action — but has not been deemed the sort of racial classification that *automatically* triggers strict judicial

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desegregation law under the federal and California Constitutions, the basis and status of ongoing California desegregation cases, and the possibility of more such cases in the future; and the "Proposal" description states that the "proposition would limit the power of California courts to require desegregation." *See* J.A. 258-260. The ballot arguments in favor of Proposition 1 also refer exclusively to matters of segregation and desegregation. Thus, State Senator Alan Robbins, the amendment's author, directs attention to "COURT-ORDERED COMPULSORY BUSING," "[*t*]*he racial tension and strife of compulsory busing*," and "the conclusion that forced busing is *not* a useful tool in achieving desegregation . . . ." J.A. 267 (capital letters and emphasis in original).

Senator Robbins' Brief in Support of Respondent describes Proposition 1 as designed "to repeal independent State authorization for mandatory busing" because "it was counter-productive to our goal of harmonious race relations and counter-productive to the achievement of student integration." *Id.* at 2. Respondent Bustop, a supporter of Proposition 1 and intervenor in the litigation below, likewise recites the Question Presented solely in terms of "mandatory reassignment of students *on the basis of race*." (Emphasis added.)

If Proposition 1 were given the construction now advanced by the board and Solicitor General, with every word reaching as far as a literal reading, independent of context, could possibly take it, then even Judge Lopez' decree of September 10, 1981 — ordering the board to "locat[e] new magnet schools in minority neighborhoods, maintain[ ] a lower student-teacher ratio in predominantly minority schools, and permit[ ] all interested minority students to participate in the PWT [one-way busing] program," Res. Br. 20 n.9 — would seem to violate Proposition 1's ban on judicial imposition of "*any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation*" unless a Fourteenth Amendment violation is demonstrated. Yet no respondent or *amicus* urges any such reading of Proposition 1 — evidently realizing that, were the amendment so sweepingly construed, it would too conspicuously bar *any* court-ordered progress toward desegregation whenever it applied.

scrutiny. *See Dayton Board of Education* v. *Brinkman (Dayton I)*, 433 U.S. 406, 413-414 (1977); *Hunter* v. *Erickson*, 393 U.S. 385, 390 n.5 (1969); *Reitman* v. *Mulkey*, 387 U.S. 369, 376, 380-381 (1967). In relying on this principle to save Proposition 1 from the requirement of a compelling justification, the board (Res. Br. 33) and the Solicitor General (U.S. Br. 12, 20 n.17) completely misstate how Proposition 1 relates to the legal regime it replaced.

First, the pre-existing law — under which there was a judicially enforceable duty to "alleviate racial imbalance in schools regardless of its cause" by all "reasonably feasible" steps, including busing, *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 881 (1963) — *never* represented a special rule for racial minorities but was grounded in the broad view California courts had taken (1) of the "right to an equal opportunity for education," *id.* at 882; *Serrano* v. *Priest*, 5 Cal. 3d 584, 601-610 (1971); (2) of the plenary authority of the state's school boards, *Crawford I*, 17 Cal. 3d 280, 294 (1976); and (3) of the state's responsibility for how school segregation was affected by the housing and other decisions of "state entities other than school boards." *Id.* at 299.[9] Characteristically, for example, the California courts have explained their refusal to treat school district boundaries as sacrosanct in fulfilling the integration mandate of *Jackson* and *Crawford I* by indicating that state courts have the same power to reach across district lines when needed to remedy *de facto* school segregation as they have to cross such lines when needed to remedy state "constitutional violations arising from discrimination in voting rights . . . . and discrimination in school financing." *Tinsley* v. *Palo Alto Unified School District*, 91 Cal. App. 3d 871, 907 (1979), *pet. for hearing den.*, June 7, 1979. In these circumstances, Proposition 1's race-specific withdrawal of state protec-

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[9] This is a complete answer to respondent Bustop's argument that the court-ordered remedial actions barred by Proposition 1 were already impermissibly race-specific under the Fourteenth Amendment. *See* Brief of Respondent Bustop at 4-7. *See also* n.3 *supra*.

tion — even if it *were* seen as a repeal of pre-existing rights — would have to be understood as selectively subtracting racial isolation, and racial isolation alone, from the list of wrongs regarding which California law had previously imposed effect-oriented duties independent of cause, intent, and such matters as local boundaries.

Second, Proposition 1 does not in fact constitute a repeal of prior rights at all. Despite the Solicitor General's claim that Proposition 1 does not make California's "right . . . to attend schools free of racial isolation, whatever the isolation's cause, . . . more difficult [to protect] than . . . other state rights . . . but redefines the underlying substantive right [itself]" (U.S. Br. 18-19; *see also* Res. Br. 26), the court below plainly held that Proposition 1 has no such structure. *See* Pet. Br. 38 & n.19. And the Solicitor General concedes, several pages after making the claim quoted above, that "under the Proposition, California school boards retain an affirmative obligation, beyond that mandated by the Fourteenth Amendment, to take steps to alleviate racial isolation, whatever its cause." (U.S. Br. 23 n.23.)

Third, whatever Proposition 1 is regarded as *repealing*, its major thrust, just as in *Hunter*, is not simply to remove, on a one-shot basis, the body of law that preceded it, but *retroactively* to cancel all gains previously made under that body of law, and *prospectively* to build into the state's constitution a permanent bar to any renewed imposition or invocation of the prior law's anti-discrimination devices -- the devices wiped out by the amendment. Thus it is not Proposition 1's mere *rescission* of *anything* "in and of itself," *Dayton I*, 433 U.S. at 414, *quoting Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974), that petitioners have *ever* challenged as a forbidden classification by race.

C. *Denying that Obstacles to Racial Desegregation as Such Constitute Racial Classifications At All.*

As a final gambit, the Solicitor General advances the curious argument that, although "Proposition 1 is indeed 'race-speci-

fic' in the sense that its obvious concern is the issue of racial isolation in California public schools" (U.S. Br. 16), Proposition 1 may nonetheless escape strict scrutiny because it "does not split the California *citizenry* into racial categories" (*id.* 17), either in terms of the groups who would have *invoked* the desegregation remedies barred by Proposition 1 or in terms of the groups who *favor* leaving courts with power to award those remedies. (*Id.*; *see also* Res. Br. 16.)

The short answer is that the Fourteenth Amendment protects *individuals*, not *groups*; it mandates judicial suspicion toward racial *classifications*, not special solicitude toward racial *classes*. Thus it mattered not that the city charter struck down in *Hunter*, 393 U.S. at 390, drew "no distinctions among racial and religious groups," subjecting "Negroes and whites, Jews and Catholics . . . to the same requirements if there is housing discrimination against them which they wish to end." What respondent board and the *Hunter* Court both describe as the amendment's "clear violation of the Equal Protection Clause," Res. Br. 34-35, was simply its "explicitly racial classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389. *Accord*, *Lee* v. *Nyquist*, 402 U.S. 935 (1972), *aff'g* 318 F.Supp. 710 (W.D.N.Y. 1970); *Evans* v. *Buchanan*, 393 F.Supp. 428, 441 (D.Del. 1975) (three-judge court), *aff'd* 423 U.S. 963 (1975).

It is no coincidence that such a difference in treatment, whether in housing or in education, "impacts upon an area of traditionally high minority concern" (U.S. Br. 16 n.15): to regard racial segregation as involving no *discrimination* since whites no less than blacks, Hispanics, and other minorities are separated by the practice is to forget that "separate" in this field is "inherently unequal." *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954); *see Loving* v. *Virginia*, 388 U.S. 1, 8 (1964); *Anderson* v. *Martin*, *supra*, 375 U.S. at 403; *Goss* v. *Board of Education*, 373 U.S. 638, 688 (1963). Contrast *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

Indeed, far from disproving Proposition 1's nature as a racial classification, the Solicitor General's concession that the measure divides *legal rights* along racial lines, *see* n.13 *infra*, underscores its presumptive invalidity as a device of segregation and deepens the case for strict scrutiny.

II. The Need for Compelling Justification is Doubly Clear Because Proposition 1 Splits the State's *Judicial System* Into Two Parts: One Court System for Minorities and Their Rights to Desegregation, Another for Everyone Else.

For over a century, this Court has acted on the explicit premise that each state's *courts*, above all, would remain fully available to vindicate not only federal rights but all applicable state law claims — particularly claims of racial discrimination, however caused, in public places.[10] That premise has

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[10] In the *Civil Rights Cases*, 109 U.S. 3 (1883), when this Court held that the Fourteenth Amendment gave Congress no power to redress purely private racial discrimination by common carriers, *id.* at 9-10, the Court expressly assumed that state courts would provide such redress. *Id.* at 17, 19. The axiom of full and equal access to state courts was indeed at the center of concern for those who wrote the Fourteenth Amendment. *See* C. Fairman, Reconstruction and Revision, Part I, 1295 (1971) (quoting Senator Howard). *Cf. Strauder* v. *West Virginia*, 100 U.S. 303, 307 (1880). Ever since, this Court "has held that the due process clauses protect civil litigants who seek recourse in the courts . . . to redress grievances." *Laverne* v. *Zimmerman*, 50 U.S.L. Week 4247, 4249 (U.S. Feb. 24, 1982). Thus "a state-created right to redress discrimination" is an "interest [protected] under the Fourteenth Amendment," *id.* at 4250; a state's freedom to "eliminate [such a right] altogether" does not extend to "procedural limitation[s] on the . . . ability to assert [it]." *Id.* Such limitations, even if not drawn along suspect lines, violate equal protection as well as due process if they are "arbitrary." *Id.* at 4253 (Blackmun, J., joined by Brennan, Marshall, and O'Connor, JJ., concurring); *id.* (Powell, J., joined by Rehnquist, J., concurring in judgment). *Cf. Lindsey* v. *Normet*, 405 U.S. 56, 78-79 (1972).

On the premise of state-court availability, *see generally* Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harv. L.Rev. 1362 (1953); *cf.* Bator, "The State Courts and Fed-

often been reasserted in this Court's decisions limiting access to the federal judiciary.[11]

Proposition 1 defeats this premise in one crucial area: those who assert rights to desegregation under state law (*Crawford I*, 17 Cal. 3d at 303) are fenced out of full and unimpeded access to state judicial vindication precisely when resort to a federal forum would be unavailing. Limiting access to state judicial remedies in this way "is the very essence of arbitrary state action," *Laverne*, *supra*, at 4253, for it is both irrational in its own terms and indefensible in terms of the most basic postulates of federal-state relations.[12] Worse, it preserves a first-class judicial system for whites and for educational problems unrelated to race, while erecting a second-class and radically

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eral Constitutional Litigation," 22 Wm. & M. L.Rev. 605, 625-31 (1981); O'Connor, "Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge," 22 Wm. & M. L.Rev. 801, 814 (1981).

[11] *See, e.g., Parratt* v. *Taylor*, 451 U.S. 527, 541 (1981); *Ingraham* v. *Wright*, 430 U.S. 651, 672-80 (1977); *Paul* v. *Davis*, 424 U.S. 693, 701, 712 (1976); *Rizzo* v. *Goode*, 423 U.S. 362, 373-81 (1976); *O'Shea* v. *Littleton*, 414 U.S. 488, 491, 493, 498-502 (1974); *Younger* v. *Harris*, 401 U.S. 37 (1971).

[12] Nothing in the text or background of Proposition 1, or in any defense ever offered for it, explains why California courts in desegregation cases should automatically mirror all the separation-of-powers, federalism, and statutory limits that bind federal courts, refusing to award decrees that even federal courts would have awarded but for considerations of federal-state comity.

Moreover, to the degree that this Court's intent requirement in equal protection cases stems from respect for state and local autonomy, *cf. Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) (Stewart, J.), even state court remedies for *de facto*, unintentional violations might properly rest, in some circumstances, directly on Fourteenth Amendment grounds. Finally, that at least some otherwise *de facto* discrimination in public schools might indeed *become* a matter of state responsibility, and might in that sense become *de jure*, once a state deliberately disabled its courts from remedying such discrimination, could well follow from the approach of the *Civil Rights Cases*, *supra*. *See Bell* v. *Maryland*, 378 U.S. 226, 306-07 & n.25 (1964) (Goldberg, J., concurring).

restricted judicial system for minorities and for problems of racial isolation in public schools. *See* Pet. Br. 30-33, 42-53.[13]

Never refuting this central point, the board rests on the assertion that Proposition 1 "incorporates the . . . Fourteenth Amendment as the governing standard" and "does not create 'obstacles' for school desegregation any more than the Fourteenth Amendment itself." (Res. Br. 19; *id.* 16.) Not only is this unresponsive; it is false. For the fact is that Proposition 1 expressly conditions state court relief upon proof of a substantive Fourteenth Amendment violation *and* a showing that the relief sought *could be imposed by "a federal court . . .* under federal decisional law . . . to remedy the specific violation." Article I, § 7(a)(2) (emphasis added). As the board puts it, Proposition 1 makes a state court's powers "identical to those of a federal court operating under the same facts and circumstances." (Res. Br. 20.) Thus the court below asked at the outset whether a federal court would do what petitioners had asked the state courts to do. (Res. Br. 6; Pet. App. 48A-49A.) But federal court authority to adjudicate and remedy legal wrongs depends upon more than the applicable substantive rules; it depends, too, upon institutional limits derived from Article III separation-of-powers principles, from principles of federalism, and from the relevant statutory limits on federal jurisdiction.[14] If, therefore, "federal decisional law" would

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[13] Discussing this aspect of petitioners' analysis, the Solicitor General calls "ingenious" the argument that "Proposition 1 *singles out a right* afforded . . . school children under [California] law to attend schools free from racial isolation, whatever the isolation's cause, and subjects [*that one*] *right to an unusual judicial process* that makes protection of the right substantially more difficult than protection of other state rights." (U.S. Br. 18; emphasis added). But no ingenuity is needed to see that the racial gerrymander worked by Proposition 1, unlike that challenged by the Seattle School District in No. 81-9, cuts through the very core of the state's court system. The Solicitor General all but concedes the point when he describes as "'race-specific'" Proposition 1's focus upon "the *issue of racial isolation*" as such. (U.S. Br. 16) (emphasis added).

[14] *See generally* Sager, "Fair Measure: The Legal Status of Judicially Underenforced Constitutional Norms," 91 Harv. L.Rev. 1212 (1978) (Four-

have defeated desegregation plaintiffs such as petitioners had they sought federal court relief, the reason may well be peculiar to the forum involved, and may indeed presuppose the availability of state judicial relief for the identical claim. *See* nn.10-12 *supra*. Yet Proposition 1 automatically slams the state court's doors on such plaintiffs whenever federal courts would do so — even where the plaintiffs' claims for relief have substantive merit under the Fourteenth Amendment,[15] or might be treated as having such merit but for a federal judicial concern to avoid intrusion into state autonomy.[16]

Such an Alphonse-and-Gaston routine, whereby state courts must step aside just because federal courts, deferring to the states, would have done the same, is utterly senseless. At the very least, therefore, strict scrutiny is required not only because Proposition 1 creates a dual court system but also

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teenth Amendment norms have substantive reach beyond the bounds within which *federal courts*, for reasons of federal-state relations and separation-of-powers, are themselves able to enforce such norms).

[15] Thus a California court prior to Proposition 1 would have enjoined state officials, in a suit by black parents or taxpayers, *see White* v. *Davis*, 13 Cal. 3d 757 (1975), from busing white pupils to all-white private schools at public expense. But even though such public support for private segregation violates the Fourteenth Amendment, *see Norwood* v. *Harrison*, 413 U.S. 455 (1973), the Solicitor General has argued that a federal court cannot hear such a suit. *See* Pet. for Cert. in *Regan* v. *Wright*, No. 81-970. On that view, Proposition 1 would automatically insulate this Fourteenth Amendment violation from redress in California's courts as well.

[16] *See* nn.10-12, 14 *supra*. Consider court-ordered interdistrict pupil assignments to remedy segregation not caused by the defendant school district. Partly out of respect for state autonomy, this Court has defined both liability and remedy in that context so as to avoid federal "'judicial interference with state prerogatives concerning the organization of local governments.'" *Hills* v. *Gautreaux*, 425 U.S. 282, 296 n.12 (1976) (upholding interdistrict remedy against *federal* agency) (quoting *amicus* memorandum of U.S. Gov't. in *Milliken* v. *Bradley*, 418 U.S. 717 (1974)); *cf. Milliken*, 418 U.S. at 741-43. But these reasons have no relevance to California's *own* courts; having disregarded local district boundaries in voting and school finance cases, the state's courts lack any neutral reason to let their enforcement of desegregation principles, state *or* federal, track district lines. *See Tinsley*, *supra* (declining to do so). Yet Proposition 1 requires just that outcome.

because it reserves for desegregation plaintiffs the burdens of its revolving-door approach to justice, and of the resulting breach in the combined remedial jurisdiction of state and federal courts.[17]

III. Proposition 1 is Not Compellingly Justified.

The only arguable candidates for such justification are palpably insufficient.[18] Petitioners examine each here.

A. *The* Quid Pro Quo *Justification: Giving Minorities Fourteenth Amendment Protection "Plus."*

Both the board (Res. Br. 21, 28, 34) and the Solicitor General (U.S. Br. 11-15) argue that Proposition 1 automatically survives the strictest Fourteenth Amendment scrutiny because, by its own terms, it provides all the protection called for by the Fourteenth Amendment — and more. Minorities, it is said, can hardly complain when they receive judicial treatment that may be "separate" but is *more* than "equal" to what the Fourteenth Amendment itself dictates.

To state the argument is to refute it. *First*, the only *relevant* comparison is between how the state's judicial system, given Proposition 1, treats *racial segregation* and how it treats *other* legal wrongs analogously cognizable under the state constitu-

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[17] The very existence of such a breach itself violates due process, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring), and conflicts with the tacit postulates of federalism. *See* nn. 10-12, 14 *supra*. Thus, to extol such a scheme as an expression of state diversity (Res. Br. 22), or to drape it in the vestments of state experimentation (U.S. Br. 12), mocks the virtues of federalism and makes the values of states' rights into mere masks for racism.

[18] Such "justifications" as savings funds and fuel (Res. Br. A2) are too patently inadequate and ill-fitting to merit extended discussion, as is the "compelling state interest" of letting the people of California have their way. *Amicus* Brief of California 6, 11-12.

tion — such as unequal school finance. To compare the *state and federal* treatments of segregation misses the whole point. *See* Pet. Br. 33-34. *Second*, the argument's premise — that Proposition 1 leaves California's courts fully equipped to vindicate all substantively valid Fourteenth Amendment school desegregation claims — is simply false. *See* Part II *supra*.

B. *The "What-You-Lost-Wasn't-Worth-Having" Justification: Questioning the Need For, and and Efficacy of, Court-Ordered Busing.*

A second justification suggested by the board (Res. Br. 19-20) and the Solicitor General (U.S. Br. 13, 24, 27) is that Proposition 1 merely abandoned "an experiment that . . . was not working — . . . [the] experiment with busing to alleviate de facto racial segregation," and replaced it with a set of approaches more likely to benefit "public school children, their parents, and the community as a whole." *Id.* at 13.[19]

It has become a familiar observation that court-ordered mandatory pupil reassignment and transportation may at times prove ineffectual or even counterproductive. *See, e.g., Columbus Board of Education* v. *Penick*, 443 U.S. 449, 483 (1979) (Powell, J., dissenting). But it is equally plain that "[i]n some instances busing will be an appropriate and useful element in a desegregation plan." *Crawford I*, 17 Cal. 3d at 309 (emphasis added). *See North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971) ("truly effective remedy" often requires "continued reliance" on busing). *See also* n.25 *infra*.

Thus Proposition 1, if justified in the terms proposed here, fails for want of anything like the requisite "exact connection between justification and classification." *Fullilove*, *supra*, 448 U.S. at 537 (Stevens, J., dissenting). It has been neither

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[19] Construed literally, Proposition 1 would, of course, rule out virtually *all* judicial techniques for desegregation. *See* n.8 *supra*.

"structured with 'precision'" nor "'tailored' narrowly to legitimate objectives," *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), since its proscription of various remedies is made to depend neither on *findings* as to the value of those remedies in the specific case, nor on precisely tailored *criteria* of likely need and efficacy.[20]

C. *The "Neighborhood Schools" Justification.*

Evidently borrowing its basic argument from the *Seattle* case (No. 81-9), the Solicitor General argues that Proposition 1 "is merely an expression of support for the maintenance of neighborhood schools." (U.S. Br. 27.) Whatever its merits in *Seattle*, this rationale cannot justify Proposition 1, which simply did not enact a state-wide, race-neutral neighborhood school policy. Indeed, by expressly sanctioning the continuing operation of mandatory, non-neighborhood plans whenever local school boards choose to adopt them, Proposition 1 deliberately eschewed the creation of a state policy that favored neighborhood schools.[21] In no sense is Proposition 1 "precisely tailored to serve a compelling governmental in-

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[20] The existence of popular support for mandatory pupil transportation, as reflected by a school board decision, certainly cannot serve as an accurate enough proxy for an unbiased determination of whether and when various reassignment remedies are needed, and are likely to work. Even with benign racial classifications, "weigh[ing] by the political process" is insufficiently reliable. *Bakke*, *supra*, 438 U.S. at 361 (Brennan, White, Marshall, and Blackmun, JJ.). *A fortiori*, such a political assessment is an insufficient proxy when the classification is challenged as invidious by a racial minority.

[21] As the Solicitor General concedes (U.S. Br. 6 n.5), Proposition 1 permits local boards to adopt "school integration" plans that rely in whole or part upon mandatory non-neighborhood student reassignment and transportation: at the time Proposition 1 was passed, "a number of California school districts . . . voluntarily operated mandatory, non-neighborhood" desegregation programs in satisfaction of their state constitutional obligations. *Id.* *See also* Res. Br. 19, 38.

terest," *Bakke*, 438 U.S. at 299 (opinion of Powell, J.), in neighborhood schools.[22]

IV. The Court Below Impermissibly Bypassed the Inquiry Mandated by *Arlington Heights*.

The decision below, in upholding Proposition 1, did not even cite, much less follow, this Court's *Arlington Heights* precedent. *See Crawford II*, 113 Cal. App. 3d at 654-55. Rather than finding suspicious the failure of the purposes stated in Proposition 1 or urged in its defense to fit what Proposition 1 actually accomplishes, *see* Part III, *supra*, the court indefensibly treated the amendment's mere incantation of race-neutral objectives as "[a] sufficient answer" to petitioners' entire claim of racially discriminatory impact and intent. 113 Cal. App. 3d at 654.[23] In an observation particularly apposite here, the court in *Brown* v. *Califano*, 627 F.2d 1221, 1231 n.57 (D.C. Cir. 1980), warned that such objectives as "preserving neighborhood schools . . . promoting safety . . . and cutting energy costs . . . have sometimes thinly hidden op-

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[22] *See also Penick*, 443 U.S. at 461 n.8 (rejecting neighborhood school policy justification where optional attendance zones, permitting white students to avoid black schools near their homes, cast doubt on "avowed[ ] . . . preference for neighborhood schools"). Allowing local school boards to desegregate with mandatory inter-neighborhood reassignment plans also forces minorities to entrust their state constitutional rights to the will of the majority — or, more specifically, of the voting majority's elected representatives on the school board. Yet the very meaning of a "right" requires placing it beyond the reach of majorities and officials. *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S. 625, 638 (1943); *Lucas* v. *Forty-Fourth Gen. Assembly of Colorado*, 377 U.S. 713, 736-37 (1964) (state-created rights to vote must be distributed one-vote-per-person even if majority approves another formula).

[23] Contrary to the Solicitor General's argument (U.S. Br. 25), nothing in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975), as quoted in *Michael M.* v. *Superior Court*, 450 U.S. 464, 470 (1981), remotely supports making "the mere recitation of a benign . . . purpose . . . an automatic shield . . . against any inquiry into . . . actual purposes." 420 U.S. at 648.

position to desegregation or equal educational opportunity." And *Brown*, upon which the board relies heavily (Res. Br. 20-21, 32-33, 36, 41), condemned as "unconstitutional" the "aim[ ] of preventing racial assignment as a desegregation remedy . . . . ," 627 F.2d at 1231 n.57, an aim that manifestly animated Proposition 1, at least in part. *See also id.* at 1235 nn. 81, 82.[24]

The board and Solicitor General, completely embracing the opinion below, appear to regard *Arlington Heights* as beside the point on the theory that increased racial isolation in public schools,[25] and even the creation of lasting impediments to using state courts to reduce such racial isolation in minority areas,[26] do not *count* as discrimination against racial

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[24] The board omits from its brief, as if inorganic to the setting, the court-ordered desegregation program, including mandatory pupil transportation, ongoing in Los Angeles when Proposition 1 was passed, and the concern then widely expressed that the program might be expanded to include nearby districts. *Contrast* U.S. Br. 27. *See* Pet. Br. 14-18.

[25] This is indisputably among Proposition 1's consequences. The trial court found below, *e.g.*, that the state's constitutional duty to petitioners could not be met absent some mandatory reassignment. Pet. Br. A16-A23. This finding was not overturned in *Crawford II*, nor in subsequent rulings in this case. Pet. Br. A32-A33.

Ending the court's mandatory program as Proposition 1 required, and replacing it with the program ordered by Judge Lopez this past fall, has, predictably, substantially increased the racial isolation of minority schools previously part of the mandatory program. Pet. Br. A29-A35. At the same time, of the 48 pairs and clusters of schools (all operating within enrollment capacity in the 1980-81 school year) that had been involved in the mandatory program that Proposition 1 ended, twenty-six schools (all but one, predominantly minority) have this year been classified by the board as overcrowded. LAUSD Enrollment Data, Oct., 1981. Thirteen of these schools were placed on a year-round schedule because of this overcrowding. *Id.* Finally, more than 85% of the students participating in the plan now in operation are minority, as are an even larger percentage of the students actually transported. *Id.*

Petitioners are aware of no unreversed federal court decision that has ever found a constitutional mandate to desegregate satisfied by a program making no use of mandatory reassignments.

[26] However construed *facially* (Parts I-II *supra*), Proposition 1 plainly has the *effect* of impeding the use of California courts to desegregate schools in minority neighborhoods.

minorities. *See* Res. Br. 18-20, 41; U.S. Br. 24-25. But the state courts found as a matter of fact,[27] just as *Brown* v. *Board of Education*, 347 U.S. at 494-95, held as a matter of law, that separating racial minorities *in itself* discriminates against such minorities.[28]

Petitioners also offered ample evidence below to buttress the inferences of intent to which Proposition 1's obvious effects, and the circumstances surrounding its sudden and unusual adoption, give rise. Since the trial court, having ruled Proposition 1's constitutionality irrelevant (Res. Br. 43), had no occasion to consider this evidence,[29] the court of appeal should at least have remanded for such consideration once it held Proposition 1 controlling. Instead, in lieu of the "sensitive inquiry into such circumstantial and direct evidence of intent as

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[27] *See Crawford I*, 17 Cal. 3d at 289 (affirming trial court finding "that minority children suffer serious harm when their education takes place in segregated public schools . . . whether such segregation is *de jure* or *de facto*," and that in Los Angeles "the plant, teachers, physical facilities and curriculum" at "minority segregated schools are in fact of poorer quality than . . . at . . . predominantly white schools.").

[28] The *Brown* Court held, quoting from the lower court in the Topeka case, that "*[s]egregation of white and colored children has a detrimental impact upon the colored children.* The impact is greater when it has the sanction of the law . . . ." 347 U.S. at 494 (emphasis added).

[29] Petitioners and the board both briefed at trial the admissibility of the materials petitioners submitted (Res. Br. 43; J.A. 309; 55 C.T. 16484-16513), all of which were presented below and are part of the record here, contrary to the board's claim. Res. Br. 43. That the trial court, deeming Proposition 1 inapplicable, did not rule on admissibility argues at most for *remand* — surely not for *this* Court to resolve that state-law issue. At all events, testimony *admitted* below included evidence probative of discriminatory intent. *See, e.g.*, Pet. Br. 92 n.52; 64 RT 9185, 9213, 9231, 9289; 65 RT 9364-9365, 9378, 9379 (testimony of court-appointed expert Orfield that part of opposition to mandatory reassignment reflects prejudice against racial minorities); 66 RT 9552-9553, 9560 (similar test. of petitioners' expert Rossell); 28 RT 4211 (similar test. of board expert Ross); 57 RT 8482-8483 (similar test. of board witness Jordan, L.A. Assoc. Super. for School Integration, regarding Los Angeles). In accord is expert opinion generally: *e.g.*, Sears, Lau, Tyler & Allen, "Self-Interest versus Symbolic Politics in Policy Attitudes & Presidential Voting," 74 Pol. Sci. Rev. 670 (1980).

may be available," *Arlington Heights*, 429 U.S. at 266, the court derided such inquiry as "pure speculation," 113 Cal. App. 3d at 655, and simply decreed, based on *its* speculation, that, because Proposition 1 "*could* have been [properly] motivated," *id.* (emphasis added), the matter was at an end. Were that the law, *Arlington Heights* would have been written never to be satisfied. Whatever "deference" is owing a conscientious state court effort to ascertain discriminatory purpose and effect, *see* Res. Br. 40, none is due here, where *no* such effort has been made — either, as proper, by the trial court, or by the court of appeal. Thus, this case at minimum must be returned to the state courts with directions to apply *Arlington Heights* appropriately.

Conclusion.

With just one exception, California's Constitution makes equal educational opportunity a fully enforceable right, giving state courts both the power and the duty to remedy violations — as with schools that are under-funded or overcrowded — that may result from no deliberate state choice to deny equality, and may require remedies that cross neighborhood and district lines. The fact that a federal court would find no Fourteenth Amendment violation or would for some other reason deny the relief sought does not lead the state's courts to follow suit by denying relief themselves — again, with just one exception.

It is *only with respect to claims of racially segregated schooling* that California confers a broad constitutional right of equal opportunity, but then bars its otherwise independent judiciary from fully vindicating that right, requiring its courts to deny pupil assignment and transportation remedies, however necessary in the particular case, precisely when a federal court would refuse this relief, and when the need for such relief from a *state* court is thus at its maximum.

Proposition 1, which created this racially defined and perversely structured gap in the state's judicial apparatus — putting in place a dual court system, with minorities alone relegated to revolving-door justice — should be strictly scrutinized and found wanting. Lacking any neutral, much less compelling, justification, it is racially discriminatory on its face, in its effects, and in its aims. The judgment of the court of appeal, which first ignored Proposition 1's racial classification and then refused even to permit inquiry into its racially discriminatory impact and intent, should accordingly be reversed.

Respectfully submitted,

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No. 81-38

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD, a Minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS OF AFRICAN AMERICAN EDUCATION COMMISSION, COMMUNITY RELATIONS CONFERENCE OF SOUTHERN CALIFORNIA, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND,
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National Political Caucus of California

San Fernando Valley Interfaith Council

Southern California Council of Churches

Southern Christian Leadership Conference of Southern California

Unitarian Universalist Service Committee

United Community Efforts, Inc.

Womens International League for Peace and Freedom, Los Angeles Branch

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INTEREST OF AMICI CURIAE[1/]

The organizations which join in this brief are interested in insuring that minority children

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[1/] (See p. 2)

are afforded equal educational opportunity. They are as one in the belief that this cannot be done under a system of segregated schools. They do not believe that separate can be equal.

The particular purpose of each organization is set out in the Appendix.

SUMMARY OF ARGUMENT

In this brief, we make two arguments: the first points to the lower court's failure to properly interpret Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II) and its consequent failure to identify Los Angeles segregation as de jure in character; alternatively, the second emphasizes the lower court's disregard of Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) in assessing Proposition 1's segregative purposes.

1/ Consent letters from petitioners and respondent to the filing of this brief concurrently are being forwarded to the Clerk of this Court.

First, we show that the court below misinterpreted Columbus and Dayton II. While it rightly understood that a school board can ordinarily pursue a neighborhood school policy without violating the federal constitution, it failed to appreciate that when a school board has a duty to desegregate it cannot act under color of law in systematic disregard of that duty without violating the Thirteenth and Fourteenth Amendments. In Dayton II, the duty was federally imposed; here the duty is state imposed. Whatever the source of the duty or the source of rights of minority children, a school board that systematically denies minority children their rights violates the federal constitution. The Constitution may itself impose no obligation for a state to disperse benefits or rights, but when it does, "the manner in which they disperse benefits is subject to constitutional limitations." Maher v. Roe, 434 U.S. 464, 470 (1977). The school board here has respected the rights of white children, but not of

minority children. This it cannot do.

Second, since the trial court found there was no difference in remedy required for Los Angeles desegregation under California law or under federal decisional law it held no Arlington Heights evidentiary hearing.

The court below likewise held no evidentiary hearing and upheld the validity of Proposition 1 without regard to the evidence petitioners had presented to the trial court. That evidence overwhelmingly sustains petitioners' contention that Proposition 1 was and is racially motivated and, therefore, must, under Arlington Heights, be declared unconstitutional. Respondent presented no evidence to controvert petitioners' showing.

We describe the impact of the official action, the historical background of the decision together with the specific sequence of events, and the departure from the normal procedural and substantive institutional policies which took place to

demonstrate that the requirements of Arlington Heights have been met.

Finally, we argue that if the Court does not consider Arlington Heights to have been met, then it should remand the case to the trial court for the hearing.

ARGUMENT

I

THE LOWER COURT MISINTERPRETED COLUMBUS AND DAYTON II, FAILING TO APPRECIATE THAT THE SCHOOL BOARD'S BAD FAITH FAILURE TO RESPECT THE RIGHTS OF MINORITY CHILDREN UNDER STATE LAW ITSELF VIOLATED THE FEDERAL CONSTITUTION.

The Los Angeles School Board, for many years,[2/] has violated its state imposed duty to desegregate its minority segregated schools and to confer the benefits owed under state law to minority children.

2/ In this section, we concentrate as did the court below on the findings of the 1970 trial court as affirmed by the California Supreme Court in 1976. Crawford v. Board of Education, 17 Cal. 3d 280, 551 P. 2d 28 (1976). Much of the material in the (cont.)

The lower court has sadly misread Dayton II as well as those cases which recognize that state officials cannot respect the rights of white children while ignoring the rights of minority children.

A. The Existence Since 1963 of a State-Imposed Duty on the Los Angeles School Board to Desegregate

In Crawford v. Board of Education, 17 Cal. 3d 280, 551 P. 2d 28 (1976) (Crawford I) the court traced the duty of school boards to desegregate back to Jackson v. Pasadena City School District, 59 Cal. 2d 876, 382 P. 2d 878 (1963). In Jackson, the court had declared that "the segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several

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Arlington Heights section infra is relevant to this period and also shows the continuing recalcitrance of the Board. The Arlington Heights section presents background to show the purposes underlying Proposition 1. Here we show that segregation in Los Angeles is de jure, not de facto.

schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." 59 Cal.2d at 880.

In Crawford I the court observed that: "[S]ince Jackson, this court has consistently reiterated the principle that the constitutional obligations of school boards in California include an obligation to undertake reasonably feasible steps to alleviate school desegregation, regardless of its cause." 17 Cal.3d at 292. That state law duty was also recognized by the court of appeal below. 113 Cal.App.3d 633, 647, 170 Cal.Rptr. 495, 504 (1980) (hereinafter the court below or Crawford II). Accordingly, the state duty to desegregate has bound respondent board since 1963. Next we point to the judicial findings that the board has in bad faith persistently breached that duty.

B The Findings of the Lower Courts that the Board Has Continually Violated that Duty in Bad Faith

The courts in Crawford I and Crawford II both recognized that the board had violated its obligations to minority children under state law. For example, in Crawford I, the court affirmed findings that the Board "'Has . . . since at least 1963, knowingly affirmatively and in bad faith" engaged in affirmative policies that segregated its students. 17 Cal. 3d at 288 (emphasis added). Specifically, the court found that the board had employed policies regarding (1) the siting and construction of new schools in a way leading to "heavy segregation"; (2) an open transfer policy with the "knowledge that such a policy would exacerbate school segregation because it would permit the more affluent white students to transfer out of minority segregated schools but at the same time could not be utlized by less affluent minority students to transfer into predominantly white schools"; (3) the use of feeder

school policies that it "knew or should have known would create and perpetuate segregation in such higher grade schools"; and (4) the use of mandatory attendance areas and boundaries "so as to create or perpetuate segregated schools." See generally 17 Cal. 3d at 288-89.

Most revealing of all, Crawford I affirmed findings that the Board had given minority schools "teachers, physical facilities and curriculum . . . of poorer quality . . . than at its predominantly white schools.'" Id. at 289.

The findings are now not open to question; indeed the court in Crawford II repeats them. 113 Cal. App. 3d at 642-43. The question is whether the lower court properly understood Columbus and Dayton II.

C. The Bad Faith Failure of the Board to Respect Its Duty to Minority Children Violates Federal Law.

The Court below failed to take the duty to desegregate and its bad faith violation into account

in concluding that no de jure segregation was present. It cited Columbus and Dayton II for propositions that are not here relevant. For example, it cited Columbus for the idea that "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." 113 Cal.Rptr. 3d at 641, quoting 443 U.S. at 464. It paraded Dayton II for the proposition that "We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination." Id. at 641, quoting Dayton II, 443 U.S. at 536 n. 9. It proceeded to see no specific segregative intent (id. at 646) and, therefore, found no de jure segregation.

What Crawford II ignored is that there is "something more" (Columbus, 443 U.S. at 646) in this case: the bad faith violation of a duty to desegregate. Clearly where a federal duty to desegregate is involved, questions of specific intent go by the boards. As the court said in Dayton II,

the measure of a school board's conduct under an "unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system." 443 U.S. at 53 (emphasis added). As the Court explained in Columbus, each instance of a failure or a refusal to fulfill this affirmative duty violates the Fourteenth Amendment. 443 U.S. at 667.

We are at a loss to understand why the source of the duty makes the slightest difference. Our contention is not that the states had to create this duty; our contention rather is that once a duty to give to minority children the benefit of desegregated education has been established "the manner in which it dispenses benefits is subject to constitutional limitations." Maher v. Roe, 432 U.S. at 470. Indeed as the Court noted in Maher, (id.) the basic framework for analyzing claims such as these was set out in San Antonio School District v. Rodriguez, 411 U.S. 1, 17 (1973), "We must decide,

first whether [the state action] operates to the disadvantage of some suspect class . . . ."

Here that conclusion is obvious. The Board, as the findings below show, has affirmatively disregarded its obligation to minority children. It has served white children appreciating their needs, and respecting their rights while flagrantly ignoring the rights of minority children. This Court, even pre-Brown was ready to strike down state actions that favored white students over black. See, e.g. Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (no duty to have schools, but can not ignore needs of black students).

What the Board has done is worse than providing separate but equal facilities. Here it has openly flouted the law. Acting under color of state law, it has persistently violated and ignored its duties under state law to minority children while serving white children. It should not be permitted to do this. "Equal protection of the laws is not achieved

through indiscriminate imposition of equalities." Shelley v. Kramer, 334 U.S. 1, 22 (1948).

II

PROPOSITION ONE IS UNCONSTITUTIONAL UNDER ARLINGTON HEIGHTS

A. Proposition One Has a Discriminatory Effect Because It Impedes Desegregation and Disadvantages Minorities

One of the relevant inquiries under Arlington Heights is whether the action has a discriminatory effect. 429 U.S. at 266.

1. The Mandatory Plan

Plans which included mandatory pupil assignment and transportation were in effect in the Los Angeles school system for the school years 1978-79, 1979-80, and most of 1980-81. With regard to the 1980 plan, a review of the enrollment statistics indicates (1) that the plan made substantial strides towards desegregating the participating

minority schools and (2) since its withdrawal those schools have once again become segregated.

In 1980-81, forty-four minority elementary schools took part in the mandatory portion of the desegregation plan. In 41 of these schools there was an improvement in the minority-white ratio of students. The statistics indicate that the mandatory plan was successful in achieving desegregation of the participating minority schools. The real story, however, is reflected in the plight of these schools since the dismantling of the mandatory plan. Of the forty-four schools participating in the plan on the elementary school level, virtually every one has reverted to its previous segregated status.

PARTICIPATING MINORITY ELEMENTARIES
IN 1980-81 P/C PROGRAM-REDUCTION
IN RACIAL ISOLATION

Schoo.	1980-81 % Minority Residential Enr'lmt	1980-81% Min. Actual Enr'lmt	1981-82 % Min. Actual Enrl. After Dismantling
	(Participating P/C Grades)		
O'Melveny	94	56	98
Windsor Hills	97	61	95
Baldwin Hills	99	66	100
Wilshire Crest	93	61	97
Camellia	84	54	85
Cahuenga	88	58	88
Roscoe	80	51	85
Fenton	89	60	92
Coliseum	100	71	94
Morningside	87	59	91
San Fernando	96	68	99
Noble	75	48	74
Hart	71	44	72
Haddon	97	70	98
Montague	88	61	90
Vaughn	99	74	99
Braddock	86	61	89
Barton Hill	93	69	93
Pacoima	99	76	99
Lankershim	77	55	80
Queen Anne	98	76	99
Osceola	76	55	83
54th Street	99	78	100
Sylvan Park	88	68	80
Park Western	84	64	68
Filmore	92	73	99
Hillcrest	99	80	100

Hawaiian	95	76	95
Telfair	98	80	98
Cienega	99	82	100
Virginia Road	98	81	98
Arminta	70	54	73
El Dorado	71	56	71
Sharp	90	77	93
Dayton Hts.	93	80	95
Cabrillo	68	55	77
Gridley	64	52	66
Arlington Hts.	99	87	99
Van Ness	75	63	30
Vine	87	83	85
Crescent Hts.	76	75	77
Playa Del Rey	66	69	72
Richland	65	73	71
Canfield	54	63	66

Source: 1980-81 residential figures from Board compilation; 1980-81 Racial and Ethnic Survey; Preliminary Racial Ethnic Survey, Oct. 1981.

2. The Voluntary Plan

The Board insists upon the implementation of an all voluntary plan for desegregation. Such plans do not, however, provide meaningful desegregation. A voluntary plan was struck down by this Court in Green v. County School Board of New Kent County, 391 U.S. 430, 440-441 (1968). Lower federal courts have consistently struck them

down.[3/]

A review of the school board's voluntary plan demonstrates that this plan, like all voluntary plans, is insufficient as a tool for desegregation unless mandatory provisions act as a supplement to the program. The school board's plan relies heavily on two programs, Permits With Transportation (PWT) and Magnet schools. PWT allows students who choose to do so to attend a different school from the one that is in the neighborhoods. The magnet program creates certain schools which because of their asserted uniqueness, are designed to attract students.

After considering the evidence the trial court concluded that the Magnet program was ineffective in achieving desegregation. "Both the district

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3/ See, e.g. Hall v. St. Helena Parish School Board, 417 F.2d 801, 807 (5th Cir. 1969), cert. denied, 396 U.S. 904 (1969); Davis v. Board of School Commissioners of Mobile County, 430 F.2d 883 & 889 (5th Cir. 1970), aff'd, 402 U.S. 33, 37 (1971); Kelly v. Guinn, 456 F.2d 100, 108-109 (9th Cir. 1972, cert. denied, 413 U.S. 919 (1973).

and the experts .... are unanimous that it is unlikely that any minority segregated schools in Los Angeles will be desegregated by the use of magnets and that the use of magnets cannot desegregate the district." Superior Court Opinion, Findings and Conclusions dated July 7, 1980 at 23, C.T. 17470. More importantly, however, is the fact that "the initial magnet program's success, if any there was, has been attributed to the threat of mandatory assignment..." Id. The total ineffectiveness of the magnet program is reflected in the statistics for the following schools:

	% Minority Enrollment			
School (Grades) Magnet Program	1978-79	1979-80	1980-81	1981-82
102nd Street (4-6) fund.	100	100	100	100
93rd Street (4-6)		100	100	100
Markham (7)		100	100	100
Dublin (1-6) fund., car awar	99	100	100	100
107th Street (4-6) fund.	98	100	100	100
Riggin (4-6) bil/mult	98	95	100	96

111th Street (4-6) gifted	97	99	100	99
Audubon (7-9) gifted			100	99
Drew (7-9)			100	100
Fremont (10-12) math/sci	100	99	99	100
Belvedere (7-9) bil/mult	100	98	98	99
El Sereno (4-9) fund.			96	97
El Sereno (7-9) gifted	100	96	92	88
Russell (1-6) gifted			87	93
Stevenson (7-8) gifted	77	84	86	71
Figueroa (1-6) gifted		79	84	98
Griffith (7-9) math/sci	91	93	81	88
Hillcrest Ces (1-6)			79	81
Peary (7-9) fund.	77	86	77	77
Mid-City Alt (K-12)			76	
Filmore (4-6) fund.		82	76	66
Ambler (1-6) gifted	89	82	77	81
32nd Street (1-6)	83	84	77	73
Sierra Park (1-6) gifted			75	81
Amestoy (K-4)		79	71	64
Banning Cip				80
Dorsey Cip				100
Figueroa Gifted (1-4)				98
Franklin Cip				79
Jordan Tech Occup.				99
Lincoln Med. Health				97
Manual Arts HCI				99

San Fernando Cip	81
Washington Com. Arts	100
Washington Math/Sci.	100

Source: 1978, 1979, 1980 Racial and Ethnic Surveys; Preliminary Racial Ethnic Survey, Oct. 1981

The PWT program was also found to be ineffective in achieving desegregation for the following reasons:

> "There are usually only disadvantages to the sending school and few advantages. The minority sending school remains segregated. There is no history of a reverse PWT influx into sending schools by white students. . . ."

> "The minority child's PWT experience does not remove the stigma attached to the sending school or the stigma to the child of going from that sending school who understands that the school he would normally be assigned to would be an all-minority school were it not for his own effort to leave that school."

> "[I]t is often the case that the PWT minority child is accorded a second class status in the receiving school in that he is continually subject to the threat of having his attendance at that school discontinued for disciplinary reasons when that sanction would not be applied to the resident student. . . ."

July 7 Opinion, pg. 20, 59 CT 17467-17468.

"That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools."

Finding of Fact No. 31, July 7, 1980 Opinion, p. 92, 59 CT. 17538

This critical failing of PWT, i.e. the fact that it places a disproportionate burden on minority child children, is relevant in an analysis under Arlington Heights.

In determining whether official action has a discriminatory impact, consideration is given to whether the action "bears more heavily on one race than another." Arlington Heights, 429 U.S. at 266. This is certainly the case here. Time and again lower federal courts have rejected voluntary plans wherein the minority students bear the full burden of achieving desegregation.[4/]

4/ E.g. NAACP v. Lansing Board of Education, 429 F.Supp. 583, (W.D. Mich. 1976), aff'd 559 F.2d 1042 (6th Cir. 1977); Arthur v. Nyquist, 473 F.Supp. 830, 839-840 (W.D. NY 1979); Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 153 (5th Cir. 1972).

Adoption of a voluntary plan for desegregation purposes in Los Angeles will result and has resulted in minority students, the victims of segregation, bearing the burden of desegregation. At the time of trial approximately 18,500 students took part in the PWT program. Only 40 to 50 white children participated. (July 7th Opinion at p. 19 fn. 2; C.T. 17466). This meant that 99.9% of the students in the program were minority. Id. There can be no doubt that it is minority students who bear the burden.

This burden is exacerbated by the long bus rides which result in the implementation of the PWT program. The trial court noted that, under the PWT program, the "average bus ride is 55 minutes each way, which means that thousands of these children are subject to even longer times en route to school." (Id. at 19 (emphasis in original).[5/]

5/ The same is true today. We are advised that PWT travel time is as long as 1 hour, 40 minutes (cont.)

Under the mandatory portion of the plan, however, bus rides averaged 20 minutes. Valley News 5/20/80, Sec. 1, pg. 10. Given these statistics, it is difficult to imagine how a voluntary plan can be constitutionally countenanced. Perhaps the most significant conclusion reached by the trial court was that the all-voluntary plan was "presented with the full realization by the board that of all the possible approaches to desegregation the voluntary plan would have the least success in desegregating the minority segregated schools." July 7, 1980 Order at 31; C.T. 17478.

Not only was the voluntary plan the least successful in achieving desegregation, but the "all-voluntary plan proposed by the respondent board holds no promise of meeting the mandate in the desegregation of minority schools." July 7, 1980 Finding

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5/ (cont.)

and Magnets as long as 1 hour and 55 minutes, with the average PWT route being 50.25 minutes and the Magnet average being 62.92 minutes. The earliest Magnet route begins at 6:05 a.m.; the earliest PWT at 6:15 a.m.

No. 31, at 92-93; C.T. 17338-9 (emphasis supplied). This statement leads to the inevitable conclusion that the board's purpose in seeking to invoke Proposition One and in resisting mandatory assignment and transportation is to impede and obstruct desegregation.

One final point. The school board extolls the virtues of the voluntary plan and sought to publicize the horrors of mandatory. In the first place, the mandatory provisions of the desegregation plan involved only a small percentage of students. Out of a total of 685 schools in the district only 153 schools were subject to the mandatory portions of the plan. Los Angeles Times, 4/4/81, Part II, p. 1; Valley News, 4/20/81, Section 1, p. 6. Further, out of a total district enrollment of 534,712 (1980 Racial and Ethnic Survey) only 57,000 students took part in the mandatory plan, both sending and receiving schools. Washington Post, 3/17/81, A14. The actual number of students who were bussed as that part of this plan were

23,300 (Los Angeles Times, 4/17/81, Valley News 4/20/81, Sec. 1, p. 1) compared to a total of 30,200 in PWT and magnets. (L.A.U.S.D. Public Information Office).

In the second place, what "horrors" have occurred were within the voluntary part of the plan. The board has, for instance, focussed and brought attention to long bus rides as an argument against "forced bussing." The long rides, however, are the result of the implementation of the voluntary programs and not from the mandatory.[6/]

6/ See With All Deliberate Speed:1954-19?? (United States Commission on Civil Rights, November 1981) Transportation of Students, pp. 37-38, and The Effect of Desegregation on Public Education, pp. 39-44.

B. The Historical Context and Specific Sequence of Events Leading up to the Passage of Proposition One Indicates the Discriminatory Intent of the Amendment

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Under an Arlington Heights analysis, a court reviews the historical background surrounding the amendment's enactment (429 U.S. at 267) and, in particular, the "specific sequence of events leading up (t0) the challenged decision." (Id.) While these are two separate factors, they are mentioned together because the evidence to be discussed in this section is relevant to both.

One of the primary purposes of Proposition One was to impede and frustrate desegregation efforts. This purpose was, in fact, noted by the Legislative Analyst in the California Ballot Pamphlet mailed to California voters:

> "This proposition would limit the power of California courts to require desegregation."
> Ballot Pamphlet Pg. 6

The main target of this constitutional amendment, however, was one city, i.e. Los Angeles. In the

ballot pamphlet, the author of the constitutional amendment commented that "Proposition One does everything the people of California may legally do to stop court-ordered forced busing in Los Angeles and in all other California school districts." Ballot pamphlet, Pg. 9, emphasis in original.

Since one of the purposes of Proposition One was to thwart desegregation efforts in Los Angeles, any analysis of the history and sequence of events surrounding the amendment's enactment must necessarily focus on desegregation efforts in Los Angeles. Any discussion of desegregation in Los Angeles, however, begins and ends with the actions of the school board since they have played a major role in the history of desegregation in that city. A review of their actions leads to the inescapable conclusion that the board has consistently attempted to "ignore, delay, circumvent, and avoid its responsibility to eliminate segregation." A Generation Deprived, (United States Commission on Civil Rights, 1977 at 87. This conclusion

is based on the following:

(1) they have continued to operate an unconstitutionally segregated school system and have refused to take affirmative steps towards desegregation;

(2) when forced, under court order, to develop desegregation plans, the plans were deemed wholly ineffective, and poorly prepared with little or no regard for their desegregative potential;

(3) when one of the proposed plans was finally implemented, they sought to instill community opposition to it; and

(4) they have used the court system to delay and prevent implementation of desegregation plans.

To top it all, the Board passed a resolution supporting Proposition 1 and actually lobbied the Governor to sign a bill calling for extraordinary procedures - an early election - for the vote on the Proposition. Exh. 521; 57 R.T. 8515.

1. The Board Has Refused to Take Action to Desegregate the Los Angeles School System

When this lawsuit was first filed in 1963, the trial court thought the School Board would voluntarily develop a plan for the desegregation of the schools. No such action occurred. (Superior Court July 7, 1980 Opinion at p. 6; C.T. 17453). In its 1970 decision, the trial court concluded that the School Board was guilty of acting in bad faith in that (1) it had failed to take any steps to alleviate the de jure segregation which existed and (2) had, in fact, acted affirmatively to contribute to and perpetuate the segregation. Superior Court May 1970 Findings; C.T. 560-585, 603-606). In 1976, the California Supreme Court also concluded that the "the board had not attempted to alleviate segregation in the district's schools." (A Generation Deprived, supra, at p. 11).

In 1977, hearings were conducted by the United States Commission on Civil Rights regarding

desegregation in Los Angeles. The commission concluded that:

> "A shifting majority of the numbers of the Los Angeles City Board of Education have violated their oaths of office by refusing for more than 13 years to take any affirmative steps to alleviate the segregation and racial isolation of students in the Los Angeles Unified School District."
> A Generation Deprived, supra, at 56

The Commission also noted that "(i)t is apparent from the history of its actions that the school board will require stimulation from external, independent sources before any meaningful progress is made toward desegregation." Id. at 47.

2. Plans Proposed by the Board Have Been Constitutionally Defective as well as Ineffective in Ending Segregation

The Commission's belief that the Board would have to be forced to develop a meaningful desegregation plan is borne out by the Board's actions throughout the course of this litigation. It was not until 1977, when the Board was forced to do so by the State Supreme Court, that a desegregation

plan was developed and presented to the court. The plan was rejected by the trial court as constitutionally infirm. (Superior Court Order of July 5, 1977; C.T. 2267).

The second Board plan was also found to be insufficient, but was reluctantly allowed to be implemented in 1978 in order to start desegregation efforts. (Superior Court Order of Feb. 7, 1978; C.T. 6934).

In 1979, the Board presented an all-voluntary plan for approval by the court.

On July 7, 1980, the trial court rendered its opinion of this plan. It noted that:

> "the respondent board does not have a course of action which is designed to make meaningful progress in the elimination of harms arising out of minority segregated schools, and... does not appear to have resolved itself to achieve any such plan in the near future."
> (July 7 Opin. at p. 3; C.T. 17450)

As to the merits of the plan itself, the court rejected the plan because:

> "1. It is not designed to desegregate any of the minority schools of the

Los Angeles Unified School District.

2. It treats minority children with less concern than other children in the district.
3. It relies entirely upon the voluntary compliance of the mandate by the children and their parents, which reliance is neither reasonable nor realistic.
4. Its provisions, viewed in light of the board's activities, do not demonstrate the board's commitment, even if given more time, to take additional steps to produce meaningful progress in the desegregation of the district's minority schools and the alleviation of the harms arising from segregation. (Id. at 5, C.T. 17452)

The trial court commented on the plan (Plan II) that had been in operation since the 1978-79 school year: "The manner in which the plan was executed carried the seeds of failure to achieve its limited goals." (Trial Court Opinion and Findings, July 7, 1980, p. 3; C.T. 17450). As to the Board's all-voluntary plan, the court found that it was "hastily conceived," "not thoroughly planned," and was "presented with the full realization by the board that of all the possible approaches to desegregation the voluntary plan would have the least

success in desegregating the minority segregated schools." Id. at 31, C.T. 17478.

3. The Board Has Sought to Instill Community Opposition to Desegregation.

Perhaps the most destructive action taken by the board, however, is its public opposition to desegregation efforts. Certain Board members have purposefully sought to instill community opposition to desegregation rather than community support. The Civil Rights Commission believes that official support is necessary in order to achieve desegregation:

> "The peaceful implementation of desegregation is not by chance. One of the most important conclusions of this report is that the support of school officials and other local leaders strongly influences the outcome of desegregation. The public generally follows the lead of officials who are responsible for school desegregation. . . ." at 223

The Commission found that "The leadership factor is the most crucial component in the peaceful implementation of desegregation. In communities

where leaders either voice opposition to desegregation or refuse to support the effort publicly, the result is often chaotic, with confusion, anxiety, turmoil and disruption prevailing." at 224. This is precisely the situation that occurred in Los Angeles.

In 1976, the Commission expressed strong concern that officials in Los Angeles, including school board members, were making public statements which were designed to "reinforce community fears about the negative potential of school desegregation." A Generation Deprived, supra, at 83.

When the Commission conducted its hearings in 1977, it found a wide range of community, religious, labor, business, and other organization support for integration. Id. at 100-152. Organizations such as ourselves still strongly support desegregation efforts. Rather than drawing upon this support, however, the Board has sought to undermine this support by instilling fear in the Los Angeles community about desegregation. A

present example of this is found in the Board's actions after the trial court rendered its May 19, 1980 opinion. One Board member, before even reading the opinion, made the following statement which was published in a number of Los Angeles newspapers:

> "If I was a white parent I'd be looking for a private school or looking for a new home outside the Los Angeles Unified School District."
> Los Angeles Herald Examiner, 5-20-80, A7.

Another Board member commented that:

> "(Judge Egley's order, if allowed to stand) will bring about the devastation of the public school system.."
> Id.

As reported in one newspaper, a third member "referred to the explosion Sunday of Mt. St. Helens in the State of Washington and said a "volcano of similar proportions has erupted from the Egly courtroom." Valley News 5-20-80, §1, p. 4.

The trial court, after rendering its July 7, 1980 opinion, had ordered meetings to be held to explain

the new plan, to seek community input into the plan, and to help alleviate concerns that parents might have about the plan. The board's response, however, was to use these meetings to publicly oppose the plan, to tell parents that the plan would not work, and to create uncertainty in the minds of the parents. Meetings were held at elementary schools in the district. "At each meeting a letter was read in which the Board of Education disavowed responsibility for the desegregation plan. Board members, including the President of the Board, appeared at several meetings in the San Fernando Valley to tell parents the board opposed the busing order." Los Angeles Times, 8-13-80, Part I, p. 3. One letter from concerned parents dramatically portrays the intent of the board to instill opposition to desegregation:

> "You ask if you will still be in junior chorus and we have to tell you we have been told by the school board that most of the extras you enjoyed are being eliminated to pay for the integration plan."
> Los Angeles Herald Examiner, A19, 9-12-80.

4. The Board Has Used the Court System to Obstruct Desegregation Efforts

One of the Board's tactics in achieving its goal of preventing the desegregation of the Los Angeles School System has been to appeal virtually every court order. The most dramatic demonstration of this concerns the board's actions in regard to Plan II which was implemented in 1978. That plan, although constitutionally infirm, was accepted in order to make some movement towards desegregation of the Los Angeles School system. But the Board joined with Bustop, an intervening organization from San Fernando Valley, and asked the State Supreme Court to continue a stay of its very own plan. Crawford v. Court of Appeal, L. A. Civil No. 31018, Memorandum of Board of Education dated September 5, 1978, p. 2. In 1979, it again attempted to halt the continuation of its own plan and recommended that another, this time an all-voluntary plan, be accepted. While this plan was

before the trial court, Proposition One passed.

After the passage of the constitutional amendment, the Board's immediate response was to invoke the provisions of Proposition One. With the passage of the constitutional amendment, the board believed that it would finally accomplish its purpose of bringing desegregation efforts to a halt in Los Angeles. The trial court ruled, however, that since the Board had been found guilty of intentional discrimination in the operation of its segregated school system, Proposition One was not applicable. May 19, 1980 Minute Order, C.T. 16850.

The result of the trial court's ruling was more appeals, culminating in the appeal presently before this Court. On July 7, 1980, the trial court, because of the refusal of the board to develop a workable desegregation plan, was forced to develop a plan itself. July 7, 1980 Opinion; C.T. 17452. The Board refused to cooperate with the court in developing a workable desegregation plan for the

coming school year: "While the appeals were pending the judge and his aides, with virtually no help from the board, worked on implementation of his ruling." Washington Post, 9-12-80, Pt. A-20. All of the Board's efforts were in the direction of preventing, through the court system, the implementation of the plan, and specifically, preventing mandatory pupil assignment and transportation, despite the fact that it knew that mandatory plans were the only effective way of desegregating the minority segregated schools. Rather than taking the time to reassure students and parents and apprising them of what they could expect at the commencement of the new school year, it focussed all its efforts on blocking the implementation of the plan. As a result, the Los Angeles school system remains in the same condition it was in 1963, with no desegregation.

C. The Procedural and Substantive Departures From Longstanding California Institutional Structures In This Case Clearly Manifest A Discriminatory Purpose

In Arlington Heights, the Court recognized that "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." 429 U.S. at 267.

Perhaps the most reprehensible feature of Proposition One is that it was designed to apply not only to future desegregation actions, but also was specifically calculated to directly interfere with this case,[7/] a case in which rights had already

[7/] "Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil assignment or pupil transportation, or which (cont.)

been secured by a final judgment that had been sustained by the California Supreme Court (Crawford v. Board of Education, 17 Cal. 3d 280 (1976)).

This extraordinary interference with the orderly enforcement of rights secured by a final judgment[8] plainly departs from longstanding and fundamental California institutional safeguards and structures. The willingness to depart from these structures

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7/ (cont.)

> requires a plan including such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification." (emphasis added)

That this was directed specifically at the 1970 judgment in Crawford is clear beyond peradventure of doubt.

8/ We note this is not a case where the issue is whether changes in law should apply to trial court judgments not yet finalized in the appellate process. Even there, serious constitutional questions are implicated. See, e.g., Mirabel v. General Motors Acceptance Corp., 537 F.2d 871, 875 n.3 (7th Cir. 1976).

itself is compelling evidence of discriminatory purpose. Specifically, this aspect of Proposition One runs roughshod over (1) the understanding that it is a special function of the judiciary in California to protect the rights of minorities against the excesses of the majority together with California's strong policy of affording access to the courts to assure that the rights of the minority shall not be abused; and (2) the strong California policy that rights secured in litigation shall not be taken away by legislation retroactively applied.

1. The Special Function of the California Judiciary in Protecting Minorities and the Related Policy of Affording Access to the Courts Have Been Uniquely Violated in This Case

If there is any aspect of the constitutional system that unites commentators and the fifty states, it is that a vital function of the courts is to protect minorities against the exdesses of the majority. This court put it in Chambers v. Florida, 309 U.S.

227, 241 (1940), "Under our Constitutional system, courts stand against any winds that blow as houses of refuge for those who might suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." California is in accord. See, e.g., Committee to Defend Reproductive Rights v. Meyers, 29 Cal. 3d 252, 281 (1981) (poor afforded special protection beyond federal constitutional requirements because they share "many characteristics of other 'insular minorities who may not be adequately protected from discriminatory treatment by the general safeguards of the legislative process."); Accord, Sail'er Inn v. Kirby, 5 Cal. 3d 1, 19 (1971) (women afforded special constitutional protection beyond federal constitutional standards because of "second class citizenship. . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities."); Purdy and Fitzpatrick v. California, 71 Cal. 2d 566, 578-79 (1969) (anticipating Graham v. Richardson,

403 U.S. 365 (1971) aliens entitled to strict standard of review because of risk of prejudice "a special mandate compels us to guard the interests of aliens.")

What is unusual about this case is not that a majority would try to change policy (protecting minorities) in the future;[9/] what is striking is that a state majority would in unprecedented fashion actually seek to interfere with a court's judgment in Los Angeles.

The distortion of California's policy of judicial protection for minorities rights is best exposed in

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9/ Even as to that issue, we believe a rational basis test would be patently insufficient. This Court, to be sure, in Dayton II, 443 U.S. at 531, n.5, observed that rescission of prior resolutions supporting desegregation would be unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment. We make two observations. First, the question of whether states may rescind protections for minorities is not the same as whether some degree of heightened scrutiny should be afforded when that is done. Given the special concern of the Thirteenth and Fourteenth Amendments for protecting minorities, actions taken to deprive them of benefits important to eliminate badges of servitude deserve a measure of judicial concern greater than that afforded to Oklahoma opticians. See, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). Second, recission of benefits to minorities when done with an improper purpose is unconstitutional. Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979).

colloboration with the violation of its equally strong policy of access to the courts. In Payne v. Superior Court, 17 Cal. 3d 908, 911 (1976), the California Supreme Court observed that "In a variety of contexts, the right of access to the courts has been reaffirmed and strengthened throughout our 100-year history. Moreover, it affirmed that the right "'includes access to all courts. . . without regard to the type of petition or relief sought'". Id. 914 (emphasis added). In substance, what Proposition One says to petitioners is this: "You have won rights to school assignments and desegregated education in the one institution specially designed to protect your rights. We take that away. Now, go to a political institution dominated by a majority and forego any access to the courts to enforce the rights you have won." This is unprecedented. Its departure from settled practice is so extreme as to negate professed desires to save gas, preserve the environment or imagined worries about

school bus safety.[10] The "departure" feature of Arlington Heights has been satisfied. A discriminatory purpose is present.

2. Depriving the Petitioners of Rights Vested in Litigation Itself Violates California Policy and Manifests Discriminatory Purpose

Proposition One conclusively carves out an exception to California's policy that final judgments are final, that rights won in litigation have vested. That exception applies to minority students seeking to secure their state guaranteed right to desegregate education and to them only.

As far back as 1857, the California Supreme Court declared that legislation impairing vested

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[10] These purposes are obvious makeweights unless somehow school bus safety or the environment is better protected by buses that ride pursuant to a "voluntary" program. Other state purposes such as preserving harmony and tranquility in the state simply cater to race prejudice. Cf. Edwards v. South Carolina, 372 U.S. 229 (1963) (answer to hostile audience problem is to quiet the audience in the absence of inability to control it).

rights is "repugnant to the plainest principles of morality and justice, and is violative of the spirit and letter of our Constitution. . ." Billings v. Hall, 7 Cal. 1, 11-12 (1957). Since then it has been uniformly recognized that the legislature is without power to impair or destroy the obligations of contractual or vested rights, and any statute which affects a vested right cannot be given retrospective operation. Pardee Construction Co. v. Californis Coastal Commission, 95 Cal. App. 3d 471, 479 (1979).[11/] See also Miller v. McKenna, 23 Cal. 2d 774 (1974).

Similarly, there is no doubt that final judgments are vested rights in California. See, e.g., Kendall v. Kendall, 122 Cal. App. 397 (1932); Barrett v. Superior Court, 104 Cal. App. 657 (1930; 13 Cal. Jur. 3d §275 at 515 (1974) ("Like a common-law

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11/ No different standard applies when the attempted divestiture takes place via the amendment process. See Farat v. Kingsburg, 98 Cal. App. 284, 291 (1929).

cause of action, a judgment is such a vested right of of property that the legislature cannot, by a retroactive law either destroy or diminish its value in any respect.")

The treatment by the court below of the vested rights argument was cryptic and evasive. First, without any explanation, it announced that the only vested right in the case was the right to be free of intentionally segregative action. 113 Cal. App. 3d at 655. But that simply ignored the existence of the 1976 decision of the California Supreme Court in this case which, if it did nothing else, plainly reaffirmed the continuing right of minority students to be free of segregation where reasonable and feasible steps could be taken to cure the condition. Here, as described in Arlington Heights, the factors usually considered important in California[12/] were ignored.

12/ These factors, of course, have independent federal constitutional significance. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960).

Second, the court below observed that "all" the amendment did was to "remove from the Courts the remedy of pupil school assignments and pupil transportation as one among scores of remedies available for use by a court to end racial isolation." Id. at 655-656. This was ingenuous. As we have previously discussed, the supporters well knew what they were doing in designing the amendment. A court cannot end segregation if it cannot compel the assignment of students. That has been this Court's experience in numerous cases in the South and the North. California has long recognized that the removal of a remedy vital to the protection of a vested right is the same as removing the right itself: "Of course, the removal of all, or substantially all, of an individual's remedies for enforcing a right would have the same practical effect as destroying the right itself. 'Remedies are the life of rights.'" Flournoy v. California, 230 Cal. App. 2d 520 (1964).

The court's brief and revealing discussion of the vested rights issue highlights the unusual steps taken in this case. A state senator from Los Angeles and a school board reacting to constitutents fueled by the same fears and stereotypes that have motivated citizens to resist desegregation in Dayton, Columbus, and elsewhere transformed those fears into law. The racial fears of Los Angeles are entitled to no more respect than those with similar fears in the South and the North. The evidence overwhelmingly points to the conclusion that segregative intent is present here and that the special role of the courts in protecting minority children must not be abandoned.

From the above, it is clearly seen that the criteria of Arlington Heights have been met and that Proposition One should not be allowed to stand. If the Court is not satisfied, however, that this discussion has demonstrated that fact, the case should be remanded for the evidentiary hearing contemplated by Arlington Heights. We discuss

this in the following section.

III

A REMAND OF THIS CASE IS APPROPRIATE IN ORDER THAT FINDINGS OF FACT BE MADE ON THE ISSUE OF WHETHER THERE WAS AN UNDERLYING DISCRIMINATORY PURPOSE BEHIND THE ENACTMENT OF PROPOSITION ONE

In its May 19, 1980 order, the trial court relied on its 1970 ruling as affirmed by the California Supreme Court in 1976 that the Los Angeles School Board had been guilty of de jure segregation in violation of the Fourteenth Amendment to the United States Constitution. As a result, the trial court did not reach the issue of the constitutionality of Proposition One. Evidence on the issue of intent to discriminate had been produced by the petitioners below, although no rebuttal evidence was introduced by the School Board. The trial court, since it did not reach the issue, did not make any relevant findings of fact.

Nor did the Court below examine the evidence on the issue of intent. Instead, it refused to look past the purposes recited in the constitutional amendment itself in clear violation of the requirements of this Court's opinion in Arlington Heights, supra (113 Cal. App. 3d 633 at 654-655.) The Court of Appeal then, without a single reference to the evidence, dismissed as "pure speculation" the possibility that intent to effect racial segregation was a motivating factor in Proposition One's passage. But in the next sentence the Court itself, again without reference to any evidence in the trial court, speculated as to the possible permissible purposes behind Proposition One. Crawford II, supra, at 655.

This Court's opinion in Arlington Heights recognized that "(d)etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, supra, 429 U.S. at 266. No such

inquiry was made in this case.

This Court and its varying members have acknowledged that the inquiry into the factual evidence of unconstitutional purpose should be made in the first instance by the trial court, subject to review by appellate courts. Dayton II, 433 U.S. at 419. "The District Court, in the first instance, subject to review by the Court of Appeals, must make new findings and conclusions as to violations in light of this opinion, Washington v. Davis, and Arlington Heights..." Id. (citations omitted). Realizing the difficulty of the task, this Court remanded the case to the trier of fact to make the complex factual determinations in the first instance." Id. See also the concurring opinion by Brennan, J., Id. at 421, 422 (supporting the remand to the District Court); Keyes v. School District No. 1 (1972) 413 U.S. 189, 205 (case remanded to district court for resolution of factual matters).

The opinion in Columbus also provides support for a remand. The majority opinion acknowledged

that the role of the trier of fact is to make findings which will not be disturbed by the Court of Appeals or by this Court unless the findings are clearly erroneous. 443 U.S. at 454-55. Justices Stewart and Burger agreed. Finally, Justice Rehnquist stated:

> "I do not suggest that the inquiry required by Dayton I and Keyes is a simple one, and reviewing courts must defer to the findings of District Court judges. But appellate courts also must ensure that these judges are asking themselves the right questions; it is clear in the instant case that critical questions regarding causality and purpose were not asked at all."
>
> Rehnquist, J., dissenting. Id. at 524.

In the instant case, no factual findings were ever made regarding the issue of intent to discriminate. The Court of Appeal did not ask any questions. This case indicates, therefore, a remand for factual findings. It is the belief of amici that a remand will result in a finding of discriminatory intent. The evidence supporting such a finding is, in fact, overwhelming, as demonstrated by the previous discussion in this brief.

CONCLUSION

The judgment below should be reversed or, in the alternative, the case remanded for the preparation of findings of fact on the issue of discriminatory intent and/or for the holding of a hearing thereon.

Respectfully submitted,

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APPENDIX

The Amici Curiae

African American Education Commission is officially a part of the Los Angeles Unified School District and acts as advisor and makes recommendations to the Los Angeles Board of Education on matters affecting the interests of black students in the school system.

Agape Fellowship participates in matters involving school desegregation. It publishes a journal, the Asianamerican Journey.

The Amalgamated Clothing and Textile Workers of America is a labor organization. Among the objects of that union, as stated in Article III of its constitution is "to defend and extend democratic institutions and procedures and the civil rights and liberties of its members and all others."

American for Democratic Action is a political organization that has an historic commitment to overcoming racial discrimination and segregation.

The Association of Black Feminists was founded for the purpose of combatting racial and sexual discrimination, particularly in the public schools where, in its view, such discrimination begins.

The Black Leadership Coalition on Education is a broadly based coalition consisting of representatives from many black community organizations such as the Urban League, the Southern Christian Leadership Conference, the National Association for the Advancement of Colored People, representatives from public offices such as the Los Angeles Mayor's Office, state and congressional elected officials and black clergymen in the Los Angeles area. It exists for the purpose of insisting that quality education in a healthy environment be made available to black students. It believes that efforts such as Proposition One denies black children educational opportunities.

The California Federation of Teachers is a statewide Federation of AFT locals. Its locals represent approximately 60,000 public and private

school teachers and employees. Equal educational opportunity has been an historic and primary focus of the Union. It has been actively involved in the legislature and in the courts in opposition to racial isolation and segregation in our public school system. It has appeared before countless school boards to urge voluntary action at the district level to achieve racial and ethnic balance in our schools. It persuaded that a segregated school system is not a school system that is providing equal opportunities for all of its students.

The California Task Force for Integrated Education, as the name suggests, is an organization seeking to provide an integrated education to all children.

Catholic Community Services seeks to promote equality for all human beings in all areas of life. It has attempted to foster better race relations in the community and believes that educational opportunities are a key component.

Chicano Integration Coalition is composed of organizations and individuals committed to achieving the desegregation of the Los Angeles public schools. It disseminates information, stimulates discus ion and promotes the involvement of the Latino community in the desegregation process.

Coalition for Economic Survival is multi-racial. Its purpose is to bridge barriers of segregated neighborhoods, to be more effective in the fight for decent, affordable housing, health care and adequate social services.

Community Relations Conference of Southern California is an umbrella organization of over 80 community organizations. One of its primary purposes is the elimination of racial and religious discrimination, and specifically, school segregation.

Crenshaw Neighbors is an organization that strives toward people being able to obtain fair housing and non-segregated public schools.

The Ethical Culture Society historically has supported racial equality. This case and the efforts of the petitioning minority students in it falls within the Society's traditional concern.

Hispanic Urban Center is an educational resource center which offers courses and workshops for educators and parents to promote understanding and acceptance of school desegregation in Los Angeles.

The Jewish Labor Committee has as one of its longstanding program objectives promoting school integration. The decision of the court below, in its view, runs counter to that goal.

Los Angeles Committee for the Defense of the Bill of Rights is a civil rights organization.

The Mexican American Legal Defense and Educational Fund is a nation-wide civil rights law firm. A primary focus of the organization has been to assure equal educational opportunity for Mexican Americans. It has participated in desegregation litigation in Austin, Houston and

El Paso, Texas, Denver, Colorado and San Bernardino, California.

The National Assembly of Women Religious has been actively involved in confronting human rights violations for the past eleven years. It has been active in advancing civil rights, in voter registration drives, in freedom schools and in desegregation cases.

The Los Angeles Club of the National Association of Negro Business and Professional Womens Clubs directs it interest toward business and professional women engaging in united action for improved social and civic conditions.

The National Association of Social Workers, California Chapter has longstanding policies on equality in education, housing and employment.

The National Committee Against Repressive Legislation has a special focus on civil liberties and on the racist aspects of repressive federal legislation. The decision in this case is vital to its total educational effort.

The National Women's Political Caucus of California combats racism and sexism, institutional violence and poverty in the United States, raises these issues in campaigns and seeks to have women elected and appointed to office.

The San Fernando Valley Interfaith Council sponsors forums and programs countering discrimination in housing, jobs, schools, etc. It is active in planning for desegregation in school systems and in interpreting such programs to the community. It has had a long term involvement in interreligious understanding.

Southern California Council of Churches has a long standing policy against racial discrimination and segregation.

The Southern Christian Leadership Conference of Southern California has been fighting and continues to fight against the denial of equal access and protection in all areas of life. It believes that racism in any form has negative effects on all concerned.

The Unitarian-Universalist Service Committee has a 40 year history in promoting human rights. It is associated with the Unitarian-Universalist Association, a religious denomination. It has had as a major project the peaceful integration of the Boston School System. Elimination of all forms of discrimination is one of its goals.

United Community Efforts, Inc. works toward the goal that the Hispanic and other minority children must have an equal educational opportunity in order to be as qualified as his or her anglo peers when he/she enters the competitive job market. It observes that this has not been the case in the past.

The Womens International League for Peace and Freedom believes that to ensure adequate education for all children is important not only for the children involved, but for the civil health of the community, state, nation and world.

The YWCA of Los Angeles has supported and will continue to support quality integrated education for all persons.

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No. 81-38

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

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Petitioners,

vs.

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Respondent.

On Writ of Certiorari
to the California Court of Appeal
Second Appellate District

BRIEF OF AMICI CURIAE BELMONT SCHOOL DISTRICT, ET AL. IN SUPPORT OF RESPONDENT

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I

INTEREST OF AMICI CURIAE

This brief is filed on behalf of amici curiae Belmont School District, Las Lomitas School District, Menlo Park School District, San Carlos School District, Woodside School District, Sequoia Union High School District, the County Committee on School District Organization, and Dr. William Jennings, County Superintendent of Schools in San Mateo, California. These amici are school districts and educational officials named as respondents in a state multidistrict desegregation lawsuit, *Tinsley v. Palo Alto*

Unified School District, et al., presently pending in the California Court of Appeal (1 Civ. 50997). The trial court in *Tinsley* dismissed the lawsuit, basing its decision on the constitutionality of Proposition 1. Given the significantly contrasting factual backgrounds of *Tinsley* and *Crawford*, we believe it will be helpful to the Court's analysis to see how Proposition 1 applied to the *Tinsley* case.

II

SUMMARY OF ARGUMENT

The *Tinsley* case illustrates how Proposition I was constitutionally applied in the setting of a multidistrict desegregation lawsuit. The new law's requirement that intentional discrimination be shown before a sweeping interdistrict remedy be imposed is consistent with federal law matching the scope of the remedy with the scope of the violation.

Proposition I was enacted by the electorate to override the *Crawford-Tinsley I* decisions which had expanded a school district's duty to remedy segregation whether intentionally caused by state action or the result of factors over which public agencies had no control. The new law embodies the same distinction contained in the Fourteenth Amendment, between de facto and de jure segregation, and therefore should be judged under the less rigid "rational basis" standard of review. Even under the stricter standard of review, Proposition I passes constitutional muster, given the limited scope of the new law and the legitimate, nonracial interests served by the statute.

Proposition I by its express terms conforms to federal law, and in no way conflicts with the federal constitution. By specifically embracing the protection of the fourteenth amendment, for the same purpose (i.e. avoidance of de jure segregation), Proposition I represents a valid attempt to balance competing educational needs, integration and local control of the schools. Proposition I, while prohibiting judicially mandated assignment or transportation in the absence of de jure acts, gives state and local educational agencies the needed flexibility to fashion appropriate desegregation strategies.

Proposition I's repeal of the *Crawford-Tinsley I* requirements was a proper exercise of the electorate's right to change state constitutional policy. The new law represents a philosophical disagreement with the policy of integration at all costs, without regard for the disruption and problems that such a narrow view entails.

III

ARGUMENT

A. The Tinsley Case

Tinsley involves an appeal from a judgment dismissing petition for writ of mandate filed by 34 parents of elementary school children seeking desegregation relief involving ten school districts in San Mateo and Santa Clara Counties and other state and local agencies serving approximately 22,000 elementary school children. The trial court sustained the school districts' demurrers to the fourth amended petition without leave to amend and entered its judgment of dismissal, from which the parents (hereafter "petitioners") appealed.

This is the second appeal in the case. On April 13, 1979, the state court of appeal issued an opinion in *Tinsley v. Palo Alto Unified School District*, 91 C.A.3d 871. ("Tinsley I"). In *Tinsley I*, the appellate court held that the petitioners had stated a cause of action for interdistrict relief and remanded the case to the lower court for trial. Upon remand, the petitioners filed a fourth amended petition and various answers and responses by the school district respondents were made thereto.

In November, 1979, the voters enacted Proposition I which amended Article I, Section 7(a) of the California Constitution. The school districts raised Proposition I as a defense in the *Tinsley* case and the trial court upheld the constitutionality of the new law. The second appeal followed.

On October 29, 1981, the court of appeal ruled that the *Tinsley* proceedings be stayed pending a decision by the U.S. Supreme Court in *Crawford*. The court stated that the constitutional issues in *Crawford* will, in all likelihood, be determinative of the outcome in *Tinsley*, and that the court should defer until the Supreme Court makes its ruling on the federal constitutional issue.

The "facts" in *Tinsley* are taken from the allegations contained in the fourth amended petition, inasmuch as the procedural posture of the case is that demurrers were sustained and the case dismissed. These allegations have never been proven, since there has never been an evidentiary hearing of any kind in the *Tinsley* case since its inception.

The allegations of the fourth amended petition may be summarized as follows: Segregated schools exist in the respondent school districts, primarily in the Ravenswood City School District, which has a predominantly minority enrollment. Reasonable and feasible steps have been available to the respondents to eliminate such segregated schools, but respondents have failed and refused to take such steps to alleviate the segregation in the schools. A multidistrict remedy provides the only reasonably feasible solution. Petitioners' children are being deprived of equal opportunities for education and equal protection and due process of law.

The *Tinsley* petition also contains the following allegation:

> "Petitioners expressly do not allege any 'de jure', 'de facto' or any acts of any of the respondents which may have contributed, significantly or insignificantly, to the present situation of racially segregated schools in the responding school districts".

This exculpatory allegation, by which petitioners expressly conceded that none of the respondents were in any way responsible for the complained-of segregation, has been important throughout the *Tinsley* case. In essence, petitioners have elected to rely upon a theory of "liability without fault", in the words of the court in *Tinsley I* (91 C.A.3d at p. 898). In the discussion which follows, we will argue that application of Proposition I to the facts of *Tinsley* produced a result consistent with federal decisional law on the same subject (interdistrict desegregation relief), thus indicating the validity of the new law.

In their amicus brief, the *Tinsley* petitioners have emphasized the small distances between the various elementary districts, (compared to the sprawling Los Angeles School district) and the alleged disparity between the test scores of the Ravenswood minority students and those from the surrounding "majority" districts.[1]

Petitioners fail to mention the other aspect of their prayed-for relief. They seek to consolidate 10 separate school districts, most of which have been in existence for more than a century.[2] These districts are located in two separate counties, each with their own separate auxiliary educational services provided under the auspices of the respective county office of education. These districts serve over 22,000 students in 9 distinct communities and are governed by 46 popularly elected school board members, each of whom must reside in their respective districts. Thus, contrary to the picture painted by opposing counsel, *Tinsley,* although on a smaller geographic scale than *Crawford,* potentially involves a widespread reorganization of many districts, reassignment of thousands of students, lengthy bus rides, and a host of other problems.

---

[1]Petitioners' reference to the test scores is misleading in that these scores do not compare the relative achievement of the minority students among the various districts, a point noted by the appellate court in *Tinsley I* (91 Cal.App.3d at p.893, fn.12)

[2]Judicial notice may be taken of the dates the various districts were created: Redwood City—1861; Belmont—1861; Portola Valley—1861; Menlo Park—1880; Ravenswood—1892; Palo Alto—1892; Las Lomitas—1904; San Carlos—1927; Woodside—1928.

B. The lower court ruling

In dismissing the *Tinsley* case, the trial judge, Melvin E. Cohn, relied primarily upon the provisions of Proposition I. (A copy of the trial court's memorandum of decision is attached as Appendix A to this brief). Judge Cohn interpreted Proposition I as limiting the due process and equal protection clauses of the state constitution, insofar as student assignment or transportation is concerned, to those obligations or responsibilities of the Fourteenth Amendment as permitted by federal decisional law. The court noted that the new law does not prohibit the governing board of a school district from voluntarily doing whatever it wants within the confines of California law with school integration plans.

The trial court also stated that Proposition I does not violate the federal constitution since it merely limits California courts to what the federal courts can do under the federal constitution. In the court's opinion, the voters of California had a right to add a provision to their constitution which limited their courts in enforcing rights involved in the assignment and transporting of school children. The court concluded that, based on the concession that respondents had committed neither de jure nor de facto acts contributing to the alleged racially segregated schools, the *Tinsley* petition could not be amended successfully under the present constraints of Article I, Section 7 of the California Constitution.

The remainder of this discussion will address the arguments raised about the constitutionality of Proposition I.

C. Proposition I was a valid initiative measure enacted to override the Crawford-Tinsley I decisions

Proposition I was a statewide initiative measure adopted by the voters at the November, 1979 general election. It has been stated that the initiative process under the California Constitution provides a means by which the electorate may effectively override unpopular judicial decisions. Under the initiative process, voters can enact statutes or amendments to the state constitution which override conflicting court decisions insofar as those decisions rely on state law. When decisions rely on federal law, statutes or constitutional amendments enacted under the initiative process are subject to attack on federal constitutional grounds. See *Amador Valley District v. State Board of Equalization* (1978), 22 Cal.3d 208, 248 (Bird, C.J. concurring); *Mulkey v. Reitman* (1966) 64 Cal.2d 529, 533, aff'd in *Reitman v. Mulkey* (1966) 387 U.S. 369; *Santa Barbara School Dist. v. Superior Court* (1975) 13 C.3d 315, 330. See also Comment, *Multi-District Desegregation,* 26 UCLA Law Review 1183, 1228 (1979).

Before Proposition I became law, California case law was that a cause of action for relief from de facto segregation could be stated regardless of the absence of any actions by school authorities causing such a condition. *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 290 (single district); *Tinsley I, supra,* 91 C.A.3d 871, 901 (multidistrict relief).

Thus, Proposition I was aimed at overruling the *Crawford-Tinsley I* holdings that de facto segregation was a sufficient basis for a court-ordered remedy involving student

transportation and assignment in either single districts or among several school districts.

D. The strict scrutiny test does not apply here, since Proposition I does not contain a "suspect" racial classification

(1) Not all law dealing with race are subject to strict scrutiny

Opposing counsel contend the "strict scrutiny" test applies to this case because Proposition I is a racial law and contains a racial classification. It has been held that such a strict standard of review only applies where "suspect classifications" are involved which deny equal protection to or violate the rights of minorities. See, e.g., *Personnel Administration v. Feeney* (1979) 442 U.S. 256, 99 S.Ct. 2282.

Opposing counsel have characterized Proposition I's classification as between judicial relief for racial wrongs and all other types of judicial relief. This characterization is obviously prompted by the opposition's desire to trigger the "suspect classification" analysis involved in prior cases dealing with racial laws. See, e.g., *Hunter v. Erickson* (1969) 393 U.S. 385, and *Lee v. Nyquist,* 318 F.Supp. 710 (W.D.N.Y.), aff'd 402 U.S. 935.

The true classification embodied by Proposition I is demonstrated by the facts in *Tinsley. Before* Proposition I became law, the court of appeal held that a cause of action for interdistrict relief was stated despite the absence of any de jure acts by any of the affected school districts. *After* Proposition I, the trial court held that on such cause of action existed. This illustrates the real classification embodied in Proposition I, which is essentially between de

jure and de facto segregation. To be more precise, the new law's true classification is between judicially imposed transportation and assignment remedies for de facto segregation and such remedies for de jure segregation.

Proposition I's real classification between court-ordered remedies for de facto segregation and those for de jure segregation is not a suspect racial classification. The same dichotomy is present under federal law. And, the same degree of protection is available under both Proposition I and the Fourteenth Amendment. Since the scope of Proposition I and the Fourteenth Amendment is co-extensive in this regard, petitioners' argument essentially asks this court to "strictly scrutinize" the Fourteenth Amendment to see if it violates itself. The very statement of the argument reveals its inherent absurdity.

In *City of Mobile v. Bolden* (1980) 100 S.Ct. 1490, the Supreme Court upheld at-large voting for city commissioners, even though at-large voting diluted the impact of the city's minority voters. In its analysis, the court noted:

> Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy."
>
> 100 S.Ct. at p. 1505

Similarly, Proposition I, which prohibits court-ordered transportation or assignment of students in the absence of de jure segregation, neither violates a "right or liberty protected by the Constitution" nor requires the stricter standard of review.

It is not true, as asserted by the other side, that the new law strips the legislature and the courts of their power to assign or transport students for racial reasons. Quite the contrary, under Proposition I state or local legislatures retain the power to enact laws to alleviate racial imbalance. The prohibition in Proposition I speaks only to certain judicially imposed remedies for de facto segregation. Both the legislature and the courts retain the power to remedy de jure violations. This distinguishes our case from *Lee v. Nyquist,* 318 F.Supp. 710 (W.D. N.Y. 1970), and *Seattle School Dist. No. 1 v. State of Wash.,* 633 F.2d 1388 (9th Cir. 1980) where the statute under attack prohibited local boards from ordering student assignments for racial reasons *under any circumstances.*

In *Tinsley* there are no allegations, let alone evidence, of intentional racial discrimination. From the very outset of this lawsuit, the *Tinsley* petitioners have expressly conceded that *no* de jure action has been taken by any of the respondents. There has been no showing whatsoever that Proposition I will result in racial discrimination in our case. The *Tinsley* petitioner's unsubstantiated and generalized allegation of Proposition I's discriminatory effect cannot, in the absence of specific allegations and evidentiary support, be used to invoke the stricter standard of judicial scrutiny. The *Tinsley* petitioners were free to amend their petition to include allegations of de jure actions following the passage of Proposition I, but elected not to do so.

(2) Assuming arguendo strict scrutiny applies, Proposition I is still valid

Should the Court conclude that the stricter standard of review applies here, we contend that Proposition I nevertheless passes constitutional muster. The compelling governmental purposes behind Proposition I include reduction of racial tensions, channelling scarce funds directly into schools, teachers, and books, the legitimate preference for neighborhood schools, local autonomy, safety considerations, increased parental involvement in school affairs, and avoidance of white flight. (See *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633, 654-655.) The new law is the least restrictive alternative since Proposition I (1) does *not* affect any remedy other than transportation and assignment, (2) does not impair the local board's right to voluntarily implement any type of remedy, and (3) does *not* relieve a local board from its constitutional duty to alleviate de jure segregation.

(3) Proposition I does not violate the federal constitution, since the new law specifically conforms to federal constitutional requirements

Even a cursory reading of the provisions of Proposition I reveals it is not violative of the federal constitution on its face. The new law expressly makes state desegregation requirements equal to the requirements under the federal constitution. Adherence to federal law does not of itself violate that same federal law. It has been uniformly held that only when there is an "unavoidable

conflict" or a "clear collision" between state and federal law, will state law be declared violative of the federal constitution. *Reynolds v. Sims* (1964) 377 U.S. 533, 584; *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 347; *N.A.A.C.P. v. Thompson*, 357 F.2d 831 (5th Cir. 1966), cert. denied 385 U.S. 820, 832-833.

There is no such "collision" or "conflict" between Proposition I and federal law. What Proposition I does is render state law and federal law congruent on the duty to desegregate schools. By its own terms, Proposition I cannot conflict with the federal constitution because it expressly directs California courts to apply federal constitutional law in determining whether mandatory student reassignment or transportation should be ordered.

The *Crawford* petitioners and amici attempt to characterize Proposition I as a racial law with an unlawful purpose. In making this argument, reference is made to the infamous *Dred Scott* case, and the supposed history of racial discrimination in California. We urge the court not to be misled by such highly inflammatory rhetoric. Proposition I should be judged on its merits, rather than by reference to mistakes of the past. As recently stated by Justice Stewart in *City of Mobile v. Bolden* (1980) 100 S.Ct. 1490, at page 1503:

> Past discrimination cannot, in the manner of the original sin, condemn governmental action that is not itself unlawful.

(4) Proposition I gives state educational agencies flexibility in fashioning desegregation remedies

Excluded from the scope of Proposition I are three types of desegregation remedies: (1) judicially imposed remedies which do not involve student transportation or assignment; (2) mandatory transportation and assignment remedies imposed by public entities other than the courts, e.g., the state legislature, the state board of education, etc. and (3) voluntary remedies adopted by local school districts which could include transportation and assignments. It is important to point out that under Proposition I these three types of remedies are available in *both* the de facto and the de jure situation. The continued availability of these remedies is significant in several ways.

First, the availability of these remedies rebuts petitioner's contention that the law promotes intentional segregation. Second, since Proposition I does not in any way prohibit a local school board from voluntarily implementing broad desegregation plans, our case is distinguishable from *Seattle School Dist. No. 1 v. State of Wash.*, 633 F.2d 1338 (9th Cir. 1980). In *Seattle*, the Ninth Circuit invalidated Initiative 350, a state statute which flatly prohibited local officials from adopting desegregation plans involving busing beyond neighborhood schools (633 F.2d at p.1347). Nothing contained in Proposition I prohibits local school boards in California from adopting such plans.

E. Proposition I's repeal of the duty under state law to alleviate de facto segregation is not violative of the federal constitution

We contend that the fact that Proposition I repealed the state duty to alleviate de facto segregation with certain remedies does not violate the federal constitution. A number of cases have held that the recission of action not required by the fourteenth amendment does not violate equal protection. In the context of school desegregation, the U.S. Supreme Court has explicitly stated that the recission of affirmative action is not unconstitutional unless the initial action was constitutionally required. *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 414; reaffirmed in *Dayton Board of Education v. Brinkman* (1979) 433 U.S. 526, 531, fn. 5, 99 S.Ct. 2971, 2976; see also *Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 329.

The U.S. Court of Appeals recently dealt with a very similar situation in *Brown v. California*, 627 F.2d 1221 (D.C. Cir. 1980). *Brown* involved federal statutes which, like Proposition I, limited mandatory reassignment without interfering with rights and duties under the Federal Constitution. In *Brown*, a group of minority schoolchildren contended that various sections of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (also known as the Esch Amendments) and the Eagleton-Biden Amendment, Pub.L. No. 95-205, 91 Stat. 1460, were unconstitutional. The statutes challenged by plaintiffs removed the right of the Department of Health, Education and Welfare (HEW) to engage in its practice of requiring mandatory reassignment of students as a condition to fed-

eral educational funds. Like Proposition I, the federal statutes placed limits only upon mandatory student reassignment; they did not prevent HEW from requiring other remedies as a condition to receiving federal educational funds or from requesting the Department of Justice to sue for relief (including reassignment) under the fourteenth amendment and Title VI of the 1964 Civil Rights Act.

The *Brown* plaintiffs argued that (1) the statutes were unconstitutional because they hampered HEW's efforts to desegregate schools and thereby impermissibly involved the federal government in the preservation of school segregation and (2) the statutes were adopted with an improper legislative intent to inhibit school desegregation. The Circuit Court, in an opinion by Judge David L. Bazelon, rejected both arguments and affirmed the trial court's ruling in all respects. Judge Bazelon's opinion in *Brown* has direct relevance to the issue of the constitutionality of Proposition I:

> [A]ppellants assert that the amendments by their plain terms, effect and purpose violate the fifth amendment by eliminating 'the single, proven, and more effective remedy for desegregating schools receiving federal aid.' There are actually two prongs to this claim. The amendments will effectively inhibit desegregation and thereby dilute the guarantees of the fifth amendment; and the amendments reflect an impermissible legislative motivation to inhibit desegregation. Because of the amendments on their face leave open many apparently effective avenues for desegregation, we are not persuaded by either argument.
>
> 627 F.2d at p.1230

So too with Proposition I. It leaves open the possible use of mandatory reassignment or voluntary plans by local boards under appropriate circumstances.

Santa Barbara School Dist. v. Superior Court (1975) 13 C.3d 315 is also relevant on the repeal issue. In *Santa Barbara*, a similar argument was made by amicus curiae that Prop. 21's repeal of several Education Code sections which mandated racially balanced schools rendered the proposition unconstitutional. First, the court stated that the argument necessitated a finding by way of judicial notice that school boards fail to fulfill their constitutional obligation, a finding the court was unwilling to make on the record before it (13 C.3d at p. 329-330). Secondly, the court viewed the essence of the argument to be that the legislative policy of racially balanced schools was inherently invulnerable to change through the initiative process. the court responded to this aspect of the argument as follows:

> On the contrary, since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the people of California through the initiative process have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people of this state of their preference for a "neighborhood school policy." (See *Keyes v. School Dist. No. 1, Denver, Colo., supra,* 413 U.S. at p. 206 [37 L.Ed.2d at p. 562].) We deem it unnecessary to the resolution of the issues now before us to determine precisely what was the intention of the electorate in this respect and accordingly intimate no views on the subject. We merely conclude that since a policy in favor of neighborhood

> schools is a reasonably conceivable one and since such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the repealing provisions found in section 2, 3 and 4 cannot be struck down as constitutionally impermissible. It may be that our assessment of the people's desires in this respect is erroneous; if so, constitutional processes are available to the people to reinstate what has been repealed.
>
> *Santa Barbara School Dist. v. Superior Court, supra,* 13 Cal.3d at p. 330.

The reasoning in *Santa Barbara* applies with equal if not greater force to the facts of this case. The *Crawford-Tinsley 1* line of cases, which has been effectively nullified by Proposition I, imposed a higher duty of desegregation as a matter of state constitutional law rather than as a federal constitutional prerequisite. Moreover, a "reasonably conceivable" intention behind Proposition I's repeal of the *Crawford* rule is the electorate's preference for neighborhood schools absent a constitutional violation.

IV

CONCLUSION

This Court has recognized that any desegration remedy, especially one which crosses district lines, involves two competing interests—the interest in an integrated educational system and the interest in local control of public education. *Milliken v. Bradley,* 418 U.S. 717 (1973). An important consideration here is the potential disruption caused by the sweeping multidistrict desegregation plans sought in *Tinsley,* especially where it is conceded that the

racial imbalance resulted from "factors for which no school board is responsible." *Columbus Board of Education v. Penick*, 443 U.S. 449, 480 (1979).

Proposition I is consistent with the principle that local school boards have the initial and primary responsibility to allevate segregation in their community schools. Proposition I embodies this principle by giving local boards the initial power to reassign and transport students. Local boards also retain the authority under Prosposition I to impose mandatory busing and assignment remedies even in the absence of a finding of de jure segregation. This, in our judgment, is a significant aspect of the new law. Unlike Initiative 350 in the *Seattle* case, local boards have not been deprived of the use of these remedies in meeting their responsibility to alleviate racial isolation within their schools.

Cutting through all of the legalisms and technical arguments raised in this case, the fundamental question facing this Court is when and under what circumstances should court-ordered mandatory busing and student reassignment take place. In 1976 the California Supreme Court in the *Crawford* decision articulated a standard that required a school board to undertake reasonably feasible steps to alleviate segregated schools regardless of its cause. The California electorate, by adopting Proposition I, retreated from that standard and have opted for such mandatory remedies only when intentional discrimination is shown.

Petitioners ask this Court to discard the intention of the electorate and to impose mandatory assignment and transportation remedies whenever racial isolation occurs

in the schools irrespective of the reasons or causes for such isolation. We submit that parents of school age children can and do have perfectly legitimate nonracial reasons for being opposed to such a result. The safety and fatigue factors involved in long bus rides have been cited by several lower federal courts in ruling against mandatory busing. *McPherson v. School District No. 186,* 426 F.Supp. 173 (S.D. Ill. 1976); *Thompson v. School Board,* 498 F.2d 195 (4th Cir. 1974); *United States v. School District of Omaha,* 418 F.Supp. 22 (D. Neb. 1976) aff'd 541 F.2d 1708 (8th Cir. 1976). The difficulties young children encounter when making the transition from a sheltered home environment to the public school are exacerbated by lengthy bus rides which take the child even further from home. In addition, removing a child already enrolled in one school for several years and assigning him or her to a different school presents further problems. Student friendships are destroyed, the educational process is fragmented, and readjustments to a strange environment have to be made.

The implicit assumption throughout the arguments by the other side is that the legal standards governing the obligations of school districts to remedy segregation can change in one direction only—towards *more* court ordered busing, *more* mandatory reassignments, *more* erosion of local control. We submit that the voters of California in adopting Proposition I have chosen a different path and that, in the absence of a discernible constitutional violation, that this court should not upset that choice.

Dated: January 26, 1982

Respectfully submitted,

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(Appendix follows)

Appendix A

Superior Court, State of California
County of San Mateo

[Filed July 10, 1980]

COHN, J.

No. 206010

Margaret Tinsley, etc., et al.

vs.

Palo Alto Unified School District,
etc., et al.

DECISION

Petitioners bring this action as parents of and guardians of both minority and non-minority children who are attending school in the Ravenswood City School District, the Menlo Park Elementary School District, the Portola Valley Elementary School District, the Las Lomitas School District and Palo Alto Unified School District. The petition alleges that the children of California have a right to a public school education and wherever reasonably feasible, the right to an integrated education. It further alleges that of approximately thirteen thousand students attending elementary schools within the boundaries of the Sequoia Union High School District, approximately ten thousand non-minority students attend schools which are predominantly non-minority and approximately three thousand minority students attend schools which are predominantly minority. It further states that a compar-

able situation exists in the Palo Alto Unified School District. The petition basically argues that the remedy available is the reassignment of students between school districts and expressly does not allege that respondents have committed either de jure or de facto acts that have contributed "significantly or insignificantly" to the present situation of racially segregated schools.

All parties to this litigation agreed at the hearing that there is but one central issue in this case, i.e., the constitutionality of the constitutional amendment submitted to the people in the 1979 general election as Proposition I. Proposition I, which was passed by the electorate of this state by an approximate 60% majority, amended Art. I, Sec. 7 of the California Constitution by limiting the due process and equal protection clauses of the state constitution in so far as assignment or transportation of students is concerned to those obligations or responsibilities of the Equal Protection Clause of the 14th Amendment to the United States Constitution as permitted by federal decisional law. Fundamentally, in this one field, it prohibits the California Courts from going farther than the federal courts. It specifically does not prohibit "the governing board of a school district" from doing whatever it wants within the confines of California law with school integration plans.

If Proposition I is adjudged constitutional, under the U.S. Supreme Court's ruling in Milliken v. Bradley, 418 U.S. 717 (decided July 25, 1974), a court may not impose a multi-district, areawide remedy for single district school segregation (with certain exceptions which are not pertinent herein.)

Petitioners earnestly argue that Proposition I violates the state constitution and the federal constitution.

The court notes that although petitioner has not abandoned the claim that it violates the state constitution, neither did they pursue it during oral argument. Suffice it to state that Proposition I is now a part of the California Constitution and could hardly be unconstitutional in a substantive way as to that constitution. The only meaningful argument that could be made would be in an adjective sense that somehow it was improperly passed. The court has examined petitioner's arguments as to a multitude of subjects in one amendment and an improper title and finds no merit in either argument. Both arguments would seem to fail under the criteria laid down by our Supreme Court in Amador Valley District v. State Bd. of Equalization, 22 Cal. 3rd 208.

Turning to the argument that Proposition I violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of federal constitution.

Counsel for the petitioners strenuously argue that school children will be deprived of a right to a decent education because of a lack of integrated schools. A fair reading of Proposition I indicates that school boards within their own jurisdiction may assign or transport children in any manner or by any method. It is only the Courts that are limited in jurisdiction and then only to federal jurisdic-

tion. This court recognizes that the California Supreme Court has said that California citizens may have more rights or duties under the California Constitution than under the federal constitution; however, in the particular field of assigning or transporting school children, the people of California have placed a provision in the California Constitution limiting California Courts in the enforcement of that particular activity. It is the opinion of this court that the voters had a right to add such a provision to their constitution and that Proposition I is constitutional under both constitutions.

Petitioner's motions for partial summary judgment and their various motions to strike are all denied. Since petitioners have conceded in their pleadings that respondents have neither committed de jure nor de facto acts that have contributed to intra district racially segregated schools, the court is of the opinion that the 4th amended petition cannot be successfully amended to state a cause of action under the present constraints of Art. I, Sec. 7 of the California Constitution. The demurrers of the Ravenswood City School District, the Portola Valley Elementary School District and the Palo Alto Unified School District are all sustained without leave to amend. The court considers that this ruling makes all other motions presently submitted moot.

Dated: July 10, 1980

/s/ Melvin E. Cohn
Melvin E. Cohn
Judge of the Superior Court

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No. 81-38

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD, a minor, etc., et al.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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No. 81-38

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE STATE OF CALIFORNIA

The matter under review challenges the constitutionality of article I, section 7(a), of the California Constitution. This brief amicus curiae in support of respondent is submitted pursuant to rule 36.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Court is being asked to invalidate an amendment to the California Constitution (known as Proposition 1)

which was adopted by an overwhelming, almost two to one, margin of the people of California who voted in the November 1979 election. The context of the request is review of a decision of the California Court of Appeal reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980) which upheld the validity of Proposition 1 against petitioners' challenge that it violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The central thesis of this challenge to the constitutionality of Proposition 1 is that it purportedly imposes restrictions on the availability of state judicial remedies "only where the wrong complained of involves racial separation or isolation—segregation of students by race in the public schools" [1] and is therefore a racial classification prohibited by the Fourteenth Amendment unless necessary to fulfill a compelling state interest. Petitioners contend that this purported disparate racial impact of Proposition 1 necessarily triggers a searching inquiry into whether an invidious discriminatory purpose was a factor motivating enactment of the constitutional amendment and that such an inquiry inevitably demonstrates that there was such a prohibited and invalidating purpose.[2]

It is not the purpose of this brief submitted as amicus curiae in support of respondent to duplicate the argument of respondent on the merits as set forth and previewed in its opposition to the petition for writ of

[1] Petitioners' Brief on the merits (Pets'. Br.) page 42.
[2] (Pets'. Br., pp. 64–98.)

certiorari. The purpose is to fully support respondent's argument and supplement it with perspective on the context in which Proposition 1 was enacted and on the vital interests of California which it promotes. In attempting to fulfill this objective, certain manifestations of petitioners' misapprehension of California law will be corrected.

Petitioners' most basic misapprehension of Proposition 1 and its effect is reflected in their definition of a prohibited racial classification upon which their entire attack on the validity Proposition 1 is based. Their definition requires that previous holdings of this Court in effect be modified if not overruled. The Court has repeatedly held that (*Dayton Board of Education* v. *Brinkman,* 443 U.S. 526, 531, n. 5 (1979)) (*Dayton II*):

> "Racial imbalance, we noted in *Dayton I,* is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment. 433 U.S, at 413–414."

By its very terms Proposition 1 has no effect whatsoever where a state court order mandating pupil school assignments or pupil transportation is required by the Fourteenth Amendment. The California Court of Appeal so held (113 Cal.App.3d at 656; 170 Cal.Rptr. 510.):

> ". . . In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by decisions of the United States Supreme Court, it [Proposition 1] merely provides a more precise contour to the

duty established by California law and court decisions to desegregate public schools regardless of cause. (Cf. *Brown* v. *Califano* (D.C. Cir. 1980) 627 F.2d 1221.)" (Clarification added.)

Moreover, nothing in Proposition 1 or the opinion of the California Court of Appeal necessarily limits its effect solely to utilization of pupil school assignments or pupil transportation to desegregate the public schools. Contrary to petitioners' contention, nothing in California law requires such an interpretation and petitioner cites no California authority which makes such an interpretation.

Overruling or limiting *Dayton* in the context of this case is particularly unwarranted. Proposition 1 leaves petitioners completely free and equal with persons of all other racial heritages to participate in the elections for and deliberations of local school boards to effectuate utilization of pupil school assignments and pupil transportation in ways which they deem desirable despite such procedures not being required by the Fourteenth Amendment. Petitioners do not contend that the Fourteenth Amendment requires utilization of pupil transportation or pupil assignment to enforce their rights thereunder in the underlying school desegregation action. Absent such a requirement, which is fully accommodated by Proposition 1, the political and legislative processes are best suited to resolve the difficult economic and social dilemmas inherent in use of pupil transportation and pupil assignment for any purpose.

Use of pupil school assignments and pupil transportation can be enormously expensive tools in implementing

educational programs even where they are necessary incidents thereto. Whether there are any educational benefits from use of pupil school assignments and pupil transportation for the exclusive purpose of maintaining racial balance in the schools or whether any such benefits outweigh the resulting loss of other beneficial aspects of an education program are open questions and strong reasons to doubt that these questions will ultimately be resolved in the affirmative are widely recognized.

Resolution of or adjustment to these economic and social dilemmas by the democratic political process is the constitutionally authorized method of redressing grievances for which no remedy is mandated by the Constitution. Yet, if petitioners' theory of prohibited racial classification is accepted, their particular theories of social good, which are not mandated by the United States Constitution, would be immune from testing in the democratic political process. Such a result would be unprecedented and would undercut any concept that constitutional adjudication is subject to neutral application of constitutional principles. The deleterious effect of such preemption of the electoral process on public confidence in the future of democratic political participation in allocation of scarce public resources would undoubtably be significant.

A state's interest in assigning authority within its governmental structure is fundamental to its sovereignty within the federal system established by the United States Constitution. Proposition 1 clarifies the distribu-

tion of power within California's governmental structure to allocate public resources associated with pupil transportation and pupil school assignment. Where the authority of the state judiciary under the state constitution is being clarified, there is no means independent of the judiciary to accomplish the clarification except, as manifested by Proposition 1, through amendment of the Constitution.

In the unprecedented event it should be determined that the clarification of power manifested by Proposition 1, which fully accommodates rights provided by the Fourteenth Amendment, constitutes a racial classification, the clarification is justified as necessary to serve a fundamental and compelling state interest.

ARGUMENT

I

PROPOSITION 1 DOES NOT CONSTITUTE AN IMPERMISSIBLE RACIAL CLASSIFICATION

A. Proposition 1 Is An Exercise Of State Sovereignty Recognized By The United States Constitution To Be Of Overriding Significance

Petitioners contend that the doctrine of *Hunter* v. *Erickson*, 393 U.S. 385 (1969) renders Proposition 1 a racial classification prohibited by the Fourteenth Amendment.[3] The basis for this contention is that Proposition 1 restricts the authority of California courts to order pupil school assignments and pupil transportation to those situations where these remedies are re-

[3] Pets'. Br., p. 49.

quired under federal law to correct a violation of the Fourteenth Amendment; whereas before enactment of Proposition 1 these remedies were available to vindicate rights of racial minorities provided under the State constitution but not provided under federal law.[4]

However, this Court expressly noted in *Hunter* v. *Erickson, supra*, 393 U.S. at pages 389–390 and n. 5, that it was not holding repeal of an ordinance which provided relief from racial discrimination to be a violation of the Fourteenth Amendment. In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 531, n. 5 (1979) (*Dayton II*), reaffirming and clarifying *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413–414 (1977) (*Dayton I*) it was held that repeal of policies promoting desegregation is unconstitutional only if such actions were required in the first place by the Fourteenth Amendment. It is undisputed that Proposition 1 by its very terms, as the California Court of Appeal recognized, authorizes California courts to order pupil school assignments and pupil transportation as required by federal case law to remedy violations of the Fourteenth Amendment. (113 Cal.App.3d at 656; 170 Cal.Rptr. 510.)

Thus, even if California had eliminated its state constitutional mandate that "local school boards have an affirmative obligation to take reasonably feasible steps to alleviate school segregation, whatever is causes,"[5] there would have been no violation of the Fourteenth Amend-

[4] Pets'. Br., p. 32.

[5] *Crawford* v. *Board of Education*, 17 Cal.3d 280, 293; 130 Cal.Rptr. 724, 731; 551 P.2d 28, 35 (1976) (*Crawford I*).

ment so long as California governmental entities were not precluded from remedying violations of the Fourteenth Amendment. *A fortiorari*, Proposition 1 does not constitute a violation of the Fourteenth Amendment by merely restricting the circumstances in which a state court may use certain remedies to those which constitute violations of the Fourteenth Amendment while leaving many other remedies [6] available to alleviate racial imbalance in the schools regardless of whether such imbalance constitutes a violation of the Fourteenth Amendment.

There are vitally important policy considerations which demonstrate the wisdom of this Court's holdings in *Hunter* v. *Erickson* and *Dayton I and II.* First, from the view of petitioners' own self interest, a rule such as they are urging the Court to adopt, which made state authorized or mandated efforts to encourage racial integration in various aspects of social, political and economic life, in effect, immutable and perpetually exempt from the political process, could actually create an otherwise nonexistent obstacle to and discourage the adoption of such policies. Moreover, such a rule, especially in the context of this case, would intrude into an area of state sovereignty repeatedly recognized by this Court as consistent with and inherent in the constitutional structure of federalism.

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[6] Widely recognized remedies in addition to pupil school assignment and pupil transportation are indentified in *Crawford I* (17 Cal.3d at 305–306; 130 Cal.Rptr. at 740–741; 551 P.2d at 44–45) and *Crawford II* (113 Cal.App.3d at p. 649; 170 Cal.Rptr. at 505).

Proposition 1 expressly recognizes that local school boards [7] have unfettered authority to use pupil school assignments and pupil transportation to achieve racial balance in their schools even in the absence of a Fourteenth Amendment mandate to do so.[8] In effect, Proposition 1 clarified the distribution of authority within the governmental structure established by the California Constitution to commit public resources to the inherently expensive [9] processes of pupil school assignments and pupil transportation. The local school boards continue to have all the authority in this regard that they had before adoption of Proposition 1. The authority of the state's judiciary to order utilization of pupil school as-

[7] Within the California governmental structure it is only the local school boards which have the responsibility and authority to take the actions needed to fulfill the state constitutional mandate to take reasonably feasible steps to eliminate racial segregation in the schools. (See *Santa Barbara School District* v. *Superior Court*, 13 Cal.3d 315, 329; 118 Cal.Rptr. 637, 648; 530 P.2d 605, 616 (1975).)

[8] California Constitution, Article I, Section 7(a) provides in pertinent part:

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended."

[9] See *Keyes* v. *School District No. One, Denver, Colorado*, 413 U.S. 189, 247–248 (1973) (Powell, J. concurring and dissenting); see also *Equal Educational Opportunity*—1971: *Hearings before the Select Committee on Equal Educational Opportunity of the United States Senate*, 92d Cong., 1st sess. (1971), part 18, pages 9008–9013, 9023, 9026, 9198–9199; *School Busing: Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives*, 92d Cong. 2d sess. (1972), parts 1–3, pages 277–280, 751, 861, 904–905, 1573–1577, 1602; *Busing of School Children: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 83d Cong., 2d sess. (1974), pages 30, 99, 104, 256–258, 275.

signments and pupil transportation is limited to the requirements under federal case law to remedy specific violations of the Fourteenth Amendment.[10]

This Court has repeatedly recognized that "[t]he Constitution does not impose on the states any particular plan for the distribution of governmental powers" and that a state has sovereign authority to distribute such power in any way it sees fit. (*Mayor* v. *Educational Equality League*, 415 U.S. 605, 615, n. 13 (1974); see also *James* v. *Valtierra*, 402 U.S. 137, 141–143 (1971).)[11] Morever, even where racial discrimination has been

[10] California Constitution, Article II, Section 7(a), provides in pertinent part:

". . . no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution."

[11] See also *East Lake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) ("Under our constitutional assumptions all power derives from the people who can delegate it to representative instruments which they create. See, e.g., The Federalist No. 39 (J. Madison)."); *Hughes* v. *Superior Court*, 339 U.S. 460, 467 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of govenment as they will between their legislative and judicial branches"); *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 255 (Warren, C. J., announcing judgment), 256–257 (Frankfurter, J., concurring), 268 (1957) (Clark, J., dissenting).

proven to be implicated in such a distribution of governmental power through its exercise in a particular instance by the designated governmental body or official,[12] this Court has suggested that invalidation of the distribution of authority as part of a federal remedy raises "delicate issues of federal-state relationships." (*Id.*, at pp. 615–616, citing *Carter* v. *Jury Comm'n of Greene County*, 396 U.S. 320, 338 (1970).)

In light of the *Dayton I and II* holding that exercise of a delegated power by state agencies or officials so as to revise policy which had been perceived as beneficial to a racial minority is not prohibited so long as the original policy was not required by the Fourteenth Amendment,[13] there could be no showing of disproportionate impact or other prohibited effect on racial minorities resulting from enactment of Proposition 1 which would override the state's sovereign right to distribute power within its constitutionally mandated governmental structure. The distribution of power manifested in Proposition 1 cannot be invalid because it leaves both state courts and local school boards with complete authority to use pupil school assignments and pupil trans-

[12] Petitioners do not contend that the finding by the Court of Appeal that the racial imbalance in respondent's schools was not the result of a violation of the Fourteenth Amendment (113 Cal. App.3d at 649; 170 Cal.Rptr. at 505) is in error. Thus, the particular application of Proposition 1 to this case is not at issue.

[13] Cf. *Hughes* v. *Superior Court*, *supra*, 339 U.S. 460, 466, wherein this Court held that a California injunction issued against picketing in support of preferential hiring of blacks as distinguished from picketing to protest racial discrimination did not constitute a violation of the Due Process Clause of the Fourteenth Amendment.

portation to remedy any violation of the Fourteenth Amendment.

The overriding significance of a state's right to distribute power within its governmental structure is acutely demonstrated in the context of Proposition 1. The purposes which the distribution of power reflected in Proposition 1 is designed to serve are set forth in its text:

> "In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

In addition to promoting the widely recognized strong state interest in maximizing local control of schools (see *Milliken* v. *Bradley,* 418 U.S. 717, 741–743 (1974)), Proposition 1 obviously responds to and adjusts for the policy directives mandated by an initiative measure adopted by the people on June 6, 1978, adding article XIII A to the California Constitution to limit taxation on real property (the amendment is known throughout the country as "Proposition 13"). Inasmuch as property tax revenues are a major source of funding for local governments and school districts, the limiting effect of Proposition 13 on the budgetary options and the inextricably

related program and policy options for local governments and school boards was immediate. (See *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization,* 22 Cal.3d 208, 225; 149 Cal.Rptr. 239, 245; 583 P.2d 1281, 1287 (1978).) The bill to refer Proposition 1 to a vote of the people for adoption as an amendment to the California Constitution pursuant to article XVIII, section 1, thereof was introduced in the California Legislature as Senate Constitutional Amendment No. 2 on December 4, 1978.[14]

The clarification by Proposition 1 of the distribution of power to allocate the substantial resources inherent in implementation of educational policy through pupil school assignments and pupil transportation among competing priorities where not needed to remedy violations of the Fourteenth Amendment is an exercise of state sovereignty which is absolutely essential to the orderly functioning of its government according to its legitimate priorities. (See *San Antonio School District* v. *Rodriquez,* 411 U.S. 1, 33–55 (1973) and *Serrano* v. *Priest,* 18 Cal.3d 728, 761–775; 135 Cal.Rptr. 345, 363–373; 557 P.2d 929, 947–957 (1976).) Confusion and uncertainty inherent in the California Supreme Court's rulings regarding when state courts are justified in making such allocations [15]

[14] See Senate Final History, 1979–80 Regular Session of the California Legislature, page 1174.

[15] In *Crawford I* the California Supreme Court articulated in general and equivocal terms the standards for ascertaining whether a school board is fulfilling its state constitutional obligation to "undertake reasonably feasible steps to alleviate school segregation, regardless of the cause of such segregation" (17 Cal.3d at 302; 130 Cal.Rptr. 724, 738; 551 P.2d 28, 42) and if it is not fulfilling its obligation, for determining what action is appropriate for the

and pending fiscal uncertainties and limitations in the

state trial courts to take. (*Id.*, at 302–320; 724–738; 28–42.)

A school is not segregated simply because the composition of the student body is imbalanced, i.e., does not "reflect the racial composition of the district as a whole," rather prohibited segregation exists in a school only where "minority enrollment is so disproportionate as realistically to isolate minority students from other students." (*Id.*, at 302–304; 738–740; 42–44.)

If schools within a school board's jurisdiction are segregated according to these criteria, the board has an obligation to choose among "virtually scores of administrative techniques for facilitating the desegregation of school systems" giving consideration "to the various factors in each case, including the practical necessities of governmental operation [quoting *Jackson* v. *Pasadena City School Dist.*, 59 Cal.2d 876, 882; 31 Cal.Rptr. 606; 382 P.2d 878, 882 (1963).]" (*Id.*, at 304–305; 739–741; 43–45.)

State courts are directed not to intrude into a school board's administration of its district even if there are "segregated" schools so long as the board has initiated, is implementing and making meaningful progress pursuant to, "reasonably feasible steps" to alleviate segregation and its harmful consequences. (*Id.*, at 305–306; 740–741; 44–45.) Intervention by a court is not justified solely because it believes that a plan different than that employed by a board will produce more rapid desegregation because such intervention has "all too often ultimately failed to result in desegregated education." (*Id.*, at 306; 741; 45.) (See also *Estes* v. *Metropolitan Branches, Dallas NAACP*, 444 U.S. 437, 450–451 (1980) (Powell, J. dissenting from dismissal of writs of certiorari as improvidently granted) quoted in *Crawford II*, *supra*, 113 Cal.App.3d at 655; 170 Cal.Rptr. at 509).)

In the event a board is not fulfilling its constitutional obligations, the trial court must follow certain guidelines in devising remedies: (1) the objective is not statistical balance among races but elimination of the harms to minority children resulting from segregated education; (2) the costs in both economic and educational terms of the alternative approaches must be weighed; (3) plans which are likely to result in a "one race" school district must be rejected; (4) alternatives which are not realistically available or involve goals which are not realistically attainable must be rejected and greater efforts in another more productive direction should be taken. (*Id.*, at 308–209; 742–743; 46–47.)

It is apparent that the Court of Appeal did not believe that the trial court correctly applied the California Supreme Court's guidelines. (113 Cal.App.3d at 642, 648–649; 170 Cal.Rptr. at 504.) On remand a new trial judge seems to have reached the same conclusion. (See Opp. to Pet. for Cert., pp. 7–8 and Pets.' Br., p. 75, n. 41.)

context of Proposition 13 [16] created the felt necessity for Proposition 1 which is reflected in its statement of purpose and in each of its provisions.

Petitioners' ultimate rationale for invalidating Proposition 1 would turn *Hunter* v. *Erickson* on its head. The members of local school boards are generally elected in California (see Cal. Ed. Code, § 35010 et seq.) and are therefore subject to recall pursuant to California Constitution, article II, sections 13 and 19, and California Elections Code section 27000 et seq.[17] Petitioners do not contend that they are precluded from, or uniquely burdened in some way on the basis of race in, exercising the right to equal opportunity to participate in the political and legislative process of the school district.

Nevertheless, the result which petitioners see as inherent in any ruling invalidating Proposition 1 is preclu-

[16] The urgency for clarification could only have been enhanced by an initiative measure to add article XIII B to the California Constitution which was adopted by the people at the same election pursuant to California Constitution article XVIII, section 3, on November 6, 1979, in which Proposition 1 was enacted. (See Cal. Stats. 1979, vol. 1, pp. A-173–A-179.) Article XIII B establishes spending limitations on both state and local governments. Such a provision limits the ability of the state to make up the revenue shortfall to local governments and school districts resulting from Proposition 13. (See, e.g., *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal.3d at 226–227; 149 Cal.Rptr. at 245–246; 583 P.2d at 1287–1288.) Indeed local governments are complaining that the state is not meeting its obligation under section 6 of article XIII B to provide local governments with the funds to support new programs which the state has allegedly required them to implement. (*County of Contra Costa et al.* v. *State of California,* Superior Court for the County of Sacramento No. 300784, Complaint for Declaratory Relief, filed Jan. 11, 1982.)

[17] Petitioners also have equal access to and opportunity to influence school boards. (See Cal. Gov. Code, § 54950 et seq.)

sion of that political and legislative process from weighing the priority of pupil school assignment and pupil transportation against any other educational priority including other means of achieving school desegregation or alleviating the effects of racially isolated schools, only when they are proposed, but not required by the Fourteenth Amendment, to desegregate minority schools.[18] (Pets'. Br., p. 59, n. 33.)

The reason for invalidation of the Akron City Charter Amendment at issue in *Hunter* v. *Erickson* as a denial of equal protection of the law was that it placed "special burdens on racial minorities within the governmental process" by requiring a referendum only on housing legislation which had the effect of eliminating discrimination in housing based on race. (393 U.S. at pp. 390–391.) Proposition 1 imposes no obstacle whatsoever to

[18] Establishing an exemption for use of pupil school assignments and pupil transportation not required by the Fourteenth Amendment from the competition in the political and legislative process with other claims on scarce funding available for public schools would be especially inappropriate in the light of serious questions which have been raised about whether these devices actually promote rather than reduce racial isolation in the public schools. (See *Estes* v. *Metropolitan Branches, Dallas, supra,* 444 U.S. at pp. 448–451 (Powell, J., dissenting.)

Apparently, there is also reason to believe that racial integration of schools, in itself, cannot be expected to result in significant improvement in the academic performance of students from previously racially isolated schools. (See "Educational Inequality: Race Is Not The Problem," William D. Rohwer, Jr., reprinted in *Integrateducation,* March–April 1975, vol. XIII, #2, pp. 3–9; see also, Orfield, "School integration and its Critics", 5 Civil Rights Digest, Summer 1973, p.5 ("We now know that substantial differences remain between middle class white children and poor white, black, Chicano, and Indian children, even when they learn in integrated classrooms. The gaps in test scores remain large and serious.")

complete and equal access for members of any racial group to the legislative and political process through which utilization of pupil school assignment and pupil transportation to achieve racial balance not required by the Fourteenth Amendment can be effected. Such was not the case in: *Lee* v. *Nyquist*, 318 F.Supp. 710, 719 (W.D.N.Y. 1970), aff'd., 402 U.S. 935 (1972) (prohibited certain school boards from implementing school desegregation even if required by the Fourteenth Amendment); *Reitman* v. *Mulkey*, 387 U.S. 369, 377 (1967) (eliminated access to any level of state government to redress racial discrimination in housing).

Obviously, petitioners do not seek what they already have, i.e., complete and equal access to the legislative process in school districts; rather by virtue of their identity as members of a minority racial group they seek, through invalidation of Proposition 1, a privileged status whereby their particular theories of social good, which are not mandated by the United States Constitution, would be immune from testing in the democratic political process. In the absence of necessity to remedy violations of the United States Constitution, no such privileged political status has ever been considered to be a mandate of the United States Constitution. (Cf. *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 166–167 (1977) and *James* v. *Valtierra, supra*, 402 U.S. at 141–143.)

Thus, this Court should reject petitioners' efforts to invalidate Proposition 1 by converting *Hunter* v. *Erickson* from a shield against racial discrimination in the

political process into a sword to preempt participation of all other citizens, including other persons of the same racial heritage,[19] who may disagree with them, in the political process of deciding the desirability and priority of petitioners' particular cause.

B. Proposition 1 Does Not Constitute A Racial Classification

Petitioners acknowledge, as its language requires, that Proposition 1 prohibits state courts in terms of general application from ordering pupil school assignments or pupil transportation except as required by the United States Constitution. (Pets'. Br. p. 37.) Nevertheless, petitioners insist that Proposition 1 be construed to apply only to pupil assignments and transportation for the purpose desegregating public schools. (Pets'. Br., pp. 35–48.) This insistence is essential to their theory of the invalidity of Proposition 1. The premises upon which this insistence is based are unjustified on their face or as interpretations of California law.

It is obvious that the construction by the Court of Appeal of the effect and validity of Proposition 1 in the

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[19] Several black leaders in California have been quoted as disagreeing with petitioners' priorities (Black Enterprise, "Turning Back the Bus", June, 1981, p. 48):

> " . . . the state's first black Assembly Speaker, Willie L. Brown, . . . says elected officials should stop defending busing and ignore it as a campaign issue. Although 'busing never has been an issue in the black community, it has been as far as black leadership is concerned[.]' "

Similarly, it was reported that black Assemblywoman Maxine Waters, urged black parents to "mobilize and show concern for improving the curriculum while motivating students to learn, and pushing for sorely needed funds to reduce class sizes and upgrade inferior schools in black areas." (id.)

context of a school desegregation case as removing "court-ordered public school assignment and transportation as a remedy available to cure state-proscribed racial imbalance in public schools" [20] is not the same as stating that Proposition 1 removes state court authority to order pupil transportation and pupil school assignments *only* where proposed for use as a remedy for racial imbalance in the public schools and does not remove such authority in the myriad of other contexts where such remedies have been used.[21] Despite their contention that the former statement is an authoritative holding [22] on the meaning of Proposition 1 to the effect of the latter statement and therefore binding on this Court (Pets'. Br., at pp. 35–37, n. 16), petitioners tacitly acknowledge the logical fallacy of the equation by inviting this Court to deduce their preferred construction independently of this California "authority". (Pets'. Br., at pp. 37–48)

A fundamental principle of statutory construction in California is that where the language of a statute has unequivocal meaning, the provision will be applied according to its terms without further judicial construction (*In re Andrews*, 18 Cal.3d 208, 212–213; 133 Cal.Rptr. 365,

[20] *Crawford II*, 113 Cal.App.3d at 653, 170 Cal.Rptr. at 508 quoted in Pets'. Br., at pp. 35–36.

[21] Petitioners acknowledge the many other contexts in which the remedy can be used. Pets'. Br., n. 25, pp. 45–46.

[22] Since no context other than school desegregation is even mentioned in *Crawford II*, had the court held as petitioners suggest, the holding would not be binding on other California courts. (See *Ball* v. *Rodgers*, 187 Cal.App.2d 442, 449–450; 9 Cal.Rptr. 666, 670 (1960).

367; 555 P.2d 97, 99 (1976).)[23] Moreover, if a statute can be construed in a manner which avoids a constitutional infirmity it should be so construed. (*San Francisco Unified School Dist.* v. *Johnson,* 3 Cal.3d 937, 942; 92 Cal.Rptr. 309, 310–311; 479 P.2d 669, 670–671 (1971).)[24]

The official title and summary of Proposition 1 prepared by the California Attorney General appeared in the ballot pamphlet distributed by the California Secretary of State prior to the election held on November 7, 1979,[25] and on the ballot for that election.[26] That official title and summary faithfully reflects the fact that the terms of Proposition 1 are not limited to the use of pupil school assignment or transportation for the purpose of desegregating public schools.[27]

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[23] Accord *Friends of Mammoth* v. *Board of Supervisors,* 8 Cal.3d 247, 256; 104 Cal.Rptr. 761, 766; 502 P.2d 1049, 1054 (1972).

[24] Accord *Amador Valley Joint Union High Sch. Dist.* v. *State Bd. of Equalization, supra,* 22 Cal. 3d at 239–242, 245; 149 Cal.Rptr. 15 254–256, 257; 583 P.2d at 1296–1298, 1299.

[25] J.A. 257–258.

[26] California Elections Code sections 3530–3533. A shorter version of the title and summary appears on voting machine labels. Elections Code sections 10301 and 10302.

[27] The fact that Proposition 1 is neutral in its limitation on judicial use of pupil transportation and pupil assignments apparently created confusion among those opponents and proponents of the measure alike who were primarily concerned with its effect, if any, on compulsory school busing. J.A. 271–274. The Attorney General obviously was not interpreting Proposition 1 in his press release. J.A. 280–281. If anything these circumstances demonstrate Proposition 1's lack of limitation of judicial use of pupil transportation and assignment for school desegregation purposes only. Moreover, the expressed clarification in Proposition 1 regarding its lack of limitation on the authority of school boards to use pupil transportation and assignment has no relevance or relationship to its patent comprehensive limitation on the authority of the state judiciary to order use of these devices. It is the limitation on the authority of the courts that is challenged by petitioners. Pets'. Br., p. 48.

Thus, the terms of Proposition 1 clearly contradict petitioners' preferred construction that it applies only to a state court's pupil transportation and assignment to achieve racial balance in the public schools.

C. Proposition 1 Does Not Impose Special Burdens On Racial Minorities

Ignoring the fact none of them applied to petitioners, they contend or imply that certain features of Proposition 1 are unique to it and therefore impose special burdens.

Petitioners contend Proposition 1 is unique because it authorizes "any interested person" to request modification of a court order which does not comply with its terms. (Pets'. Br., pp. 44, 87.) However, California law provided authority for such action prior to enactment of Proposition 1. Moreover, petitioners were not affected by this provision.[28]

The term "any interested person" had legal significance before enactment of Proposition 1 in the context for which it is used therein.[29] In California it is presumed that where a new law uses terms similar to those given meaning in preexisting judicial constructions, the draft-

[28] Opposition to Petition for Certiorari, pages 19–20; *Crawford II*, 113 Cal.App.3d at 636; 170 Cal.Rptr. at 370.

[29] Petitioners contend that the California Legislative Analyst's analysis of Proposition 1 authoritatively interpreted "any interested person" to mean "any person" thereby treating the word "interested" as mere surplusage. (Pets'. Br., p. 87.) This interpretation violates a fundamental principle of statutory construction whereby every word of a statute, especially those with preexisting legal significance, is to be given effect. (See *People* v. *Gilbert*, 1 Cal. 3d 475, 480; 82 Cal.Rptr. 724, 728; 462 P.2d 580, 584 (1969).) The Legislative Analyst is an employee of the Legislature whose function is to provide budgetary and fiscal, not legal, analysis. (See Cal. Gov. Code, §§ 9140, 9143.)

ers of the new law were familiar with these constructions and intended that the new law be interpreted accordingly. (See *Bishop* v. *City of San Jose,* 1 Cal.3d 56, 65; 81 Cal. Rptr. 465, 471; 460 P.2d 137, 143 (1969) and *People* v. *Curtis,* 70 Cal.2d 347, 355; 74 Cal.Rptr. 713, 718; 450 P.2d 33, 38 (1969).)

In the course of holding that any person, whether or not a party to the original action, who is "aggrieved" by a judgment may appeal, the California Supreme Court stated that (*County of Alameda* v. *Carleson,* 5 Cal.3d 730, 736–737; 97 Cal.Rptr. 385, 389–390; 488 P.2d 953, 957–958 (1971)):

> "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations omitted.] Appellants' interest 'must be immediate, pecuniary, and substantial, and not nominal or a remote consequence of the judgment.' [Citation omitted.]"

The concept of "interested person" in the context of school desegregation cases has been given definition in *Bustop* v. *Superior Court,* 69 Cal.App.3d 66; 137 Cal.Rptr. 793 (1977) (parents of children attending schools of defendant school district who oppose position of plaintiffs).[30] It is apparent that such persons could appeal any judgment adverse to their interests pursuant to *County of Alameda* v. *Carleson, supra,* before Proposition 1 was enacted. It is also apparent from *Bustop* that prior to enactment of Proposition 1 these "interested

[30] Accord *Johnson* v. *San Francisco Unified School District,* 500 F.2d 349, 353–354 (9th Cir. 1974).

persons," even though not parties to the action, could at any time petition a court for modification of any injunction mandating pupil transportation and pupil assignments.

In California a final, permanent injunction may be dissolved or modified any time there is a change in the law affecting the validity of the injunction, or in the facts upon which the injunction was justified or when the ends of justice would be served thereby. (*Sontag Chain Stores Co.* v. *Superior Court,* 18 Cal.2d 92, 94–95; 113 P.2d 689, 690 (1941).) Persons affected by the injunction would have standing to seek such modification. (Cf. *Ross* v. *Superior Court,* 19 Cal.3d 899, 906; 141 Cal.Rptr. 133, 137; 569 P.2d 727, 731 (1977) and *Berkeley Lawn Bowling Club* v. *City of Berkeley,* 42 Cal. App.3d 280, 291; 116 Cal.Rptr. 762, 770 (1974).)

Although it had no effect on them for the same reasons that the modification provision did not affect them, petitioners suggest providing precedence over other civil court actions for an action seeking modification pursuant to Proposition 1 is also unfair. (Pets.' Br., p. 87, fn. 50.) They acknowledge however that providing such precedence is not unique to Proposition 1. Most declaratory relief actions are entitled to precedence. (Cal. Code of Civ. Proc., § 1062(a).)

Obviously, it is of great urgency that a school board and its constituents be informed as to whether funds committed by court order remain an uncontrollable aspect of the district budget or are available for other pressing priorities. In other circumstances where sub-

stantial amounts of money are tied up and unavailable for other immediate claims on its use, such precedence has been provided. (See, e.g., Cal. Gov. Code. § 14355.

Petitioners contend that enactment of Proposition 1 at a special election is unique and sinister. (Pets'. Br., p. 84.) However, special elections for this purpose are authorized by California Constitution article II, sections 8(c) and 9(c). Moreover, there were three other measures on the same special election ballot.[31]

Thus, the terms of Proposition 1 and their relationship to preexisting California law provide no basis for concluding that it constitutes a racial classification.

II

PROPOSITION 1 IS NOT TAINTED BY ANY INTENT TO DISCRIMINATE AGAINST A RACIAL MINORITY

As an alternative to their argument based on *Hunter* v. *Erickson* that Proposition 1 is unconstitutional as a racial classification, petitioners appear to contend that even if the former argument is rejected, Proposition 1 is invalid under *Arlington Heights* v. *Metropolitan Housing Corporation*, 429 U.S. 252 (1977) because it should be inferred that racial animus was a motivating factor in its enactment. (Pets'. Br., pp. 64–69.)

The California Court of Appeal held that petitioners had not established that race was a motivating factor in enactment of Proposition 1 and that Proposition 1 would have been enacted in any event. The findings of the

[31] California Statutes 1979, volume 1, page A-173.

Court below are correct and should be upheld.

Moreover, an inquiry into the motivations of the California Legislature and electorate in enacting Proposition 1 is unwarranted and constitutionally irrelevant because Proposition 1 has no disproportionate impact on the ability of any racial minority to participate in the political process.

A. The Finding By The California Court Of Appeal That Enactment Of Proposition 1 Was Not Motivated By An Intent To Discriminate Against A Racial Minority Is Correct

The Court of Appeals concluded that none of the evidence presented by petitioners was sufficient in isolation or in cumulative effect to support an inference that the intent to effect racial segregation or discriminatory purpose was a motivating factor in enactment of Proposition 1. (113 Cal.App.3d at 654–656; 170 Cal.Rptr. 569–570.)

Moreover, the court held that the effects of Proposition 1 are consistent with the purposes noted in its text and that none of petitioners' evidence demonstrated that its recitation of purpose is less than comprehensive. (*Id.*) Thus, it is apparent that the court below believed that Proposition 1 would have been enacted even in the absence of any racial animus posited by petitioners. (See *Arlington Heights, supra,* 429 U.S. at 270, n. 21.)

Just as in *Reitman* v. *Mulkey, supra,* 387 U.S. at 378–379 this Court should accept the findings of the California court "armed as it is with the knowledge of the facts and circumstances concerning the passage and potential impact of [Proposition 1], and familiar with the milieu in which that provision would operate. . . . "

B. An Inquiry Into Whether Intent To Discriminate Against A Racial Minority Was A Motivating Factor In Enactment Of Proposition 1 Is Unwarranted Because It Has No Disproportionate Impact On A Racial Minority

Petitioners appear to contend that because they feel strongly that a particular political issue which they associate with their racial identity can be resolved only one way, it should be immune from the political process even if their preferred resolution is not mandated by the United States Constitution. (Pets'. Br., pp. 71–80.) The rationale is that rejection of, or existence of the opportunity to reject, their political position is per se racial discrimination.

Where no obstacles have been raised to participation in the political process to achieve their objectives, which are not constitutionally mandated, inquiry into the motivations for disagreement are constitutionally unwarranted. In the context of reviewing a state reapportionment plan alleged to have been devised to achieve racial objectives, it was noted that an argument such as petitioners is constitutionally irrelevant (*United Jewish Organizations* v. *Carey, supra,* 430 U.S. at 166–167 (Opn. of White, J., announcing the Court's judgment)):

> " . . . as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgment of their right to vote on the grounds of race. Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did

not vote. Some candidate, along with his supporters, always loses. . . .

"Where it occurs, voting for or against a candidate because of his race is an unfortunate practice . . . However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process." (Citation omitted; n. omitted.)

Arlington Heights v. *Metropolitan Housing Corporation, supra,* 429 U.S. at 266 is consistent with the view expressed in *United Jewish Organizations;* it does not hold that an inquiry into whether invidious discriminatory purpose was a motivating factor is required where the burden of establishing disproportionate impact has not been met.

For the reasons set forth in part I it is clear that the Court of Appeal's conclusion of no disproportionate impact is correct. Thus, a searching inquiry to determine whether invidious purpose was a motivating factor in enacting Proposition 1 is unwarranted and irrelevant.

Moreover, even if such purpose had been found to be a motivating factor, the absence of a disproportionate impact and the overriding state interest which Proposition 1 is necessary to implement, demonstrate that it is consistent with the priorities of the Fourteenth Amendment and should be upheld.

CONCLUSION

The judgment of the California Court of Appeal, Second Appellate District, should be affirmed.

Respectfully submitted,
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No. 81-38

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SUPREME COURT
OF THE UNITED STATES
October Term 1981

MARY ELLEN CRAWFORD, A MINOR, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

BRIEF OF AMICI MEMBERS OF THE BAR OF THE STATE OF CALIFORNIA

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1981
No. 81-38

MARY ELLEN CRAWFORD, a minor,
etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY
OF LOS ANGELES

**ON WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT**

BRIEF OF AMICI MEMBERS OF THE BAR OF THE STATE OF CALIFORNIA

Pursuant to Rules 35 and 42(1) of the Rules of this Court, amici respectfully file their petition for leave to file their Brief in support of the Petitioners. The Written consents of all parties hereto are filed with the Clerk of the Court concurrently herewith.

INTEREST OF AMICI

The signers of this brief are residents of the Los Angeles area and members of the California Bar. Their interest in this case is twofold.

As residents of the Los Angeles community, they are deeply concerned with the education of the children of the area and with their right to substantially equal educational opportunity in the public schools here.

As members of the Bar, they are equally concerned with the preservation of the constitutional right of those children in their pursuit of an education. Cognizant of their duties as officers of the Court, they deem it incumbent upon them to express their views to this Court.

BY REASON OF THE RACIALLY SEGREGATED RESIDENTIAL PATTERNS PREVAILING IN LOS ANGELES, LARGELY CREATED BY STATE ACTION, PROPOSITION ONE HAD, AND WAS INTENDED TO HAVE, A RACIALLY DISCRIMINATORY EFFECT.

1. The Racial Restrictive Covenant and the Creation of Racially Segregated Residential Patterns in Los Angeles.

The crux of the problem in eliminating the dual school

system found in **Crawford v. Board of Education**, 17 Cal. 3d 280, 287, n1, n2 (1976) lies in the sharply delineated racial segregation of residential areas in Los Angeles and the distances between them. (JA 368). It has been uncontested in the Crawford litigation that the vast bulk of the black children live in the Central Avenue-Watts area, of the Chicano children in the Los Angeles east side and of the white children in the west and north sides. That segregation has long historical antecedents and it was implanted upon the city by state enforcement of racial restrictive covenants.

Continuously until 1948 the courts of California enforced as covenants running with the land agreements and deed restrictions forbidding use or occupancy of residential property by non-Caucasians, including persons of Mexican descent. **Los Angeles Investment Co. v. Gary** (1919), 181 Cal. 680, 683-684 [186 P. 596,] 9A.L.R. 115; **Wayt v. Patee** (1918), 205 Cal. 46, 49-50 [269 P. 660]; **Littlejohns v. Henderson** (1931), 111 C.A. 115, 118 [295 P. 95]; **Letteau v. Ellis** (1932), 122 Cal. App. 584, 587 [10 P. 2d 496]; **Stone v. Jones** (1944); 66 C.A. 2d 264, 269 [152 P. 2d 19]; **Shideler v. Roberts** (1945), 69 C.A. 2d 549, 557 [160 P. 2d 67]; see also **Fairchild v. Raines** (1944), 24 Cal. 2d 818, 827 [151 P. 2d 260]. Indeed, one decision held that such enforcement and the consequent development of slum conditions in areas available for non-Caucasian use, including overcrowding, dilapidations and disease, did not contravene the "Public Policy" of the state or nation. **Burkhardt v. Lofton** (1944) 63 C.A. 2d 230, 239, [146 P. 2d 720].

The use and enforcement of the racial restrictive covenant has been described as "in the field of residence, the end result of that impulse toward racial segregation which arose in the post-reconstruction period and has continued almost unabated down to our time." (Miller — **Covenants for Exclusion,** 36 Survey Graphic 541 (1947).) It is uncontrovertible that such covenants were so conceived in Los Angeles and its environs. The in-migration of blacks assumed substantial proportions in the decade of the 30's, amounting to 25,000. By 1927 the Los Angeles Realty Board adopted a policy of not selling residential property to non-Caucasians in areas of Caucasian occupancy, and a survey by the California Real Estate Association disclosed that it was the general opinion of real estate boards in the state that deed and covenant restrictions were the best way to keep non-Caucasians out of the Caucasian districts. (Helper — **Racial Policies and Practices of Real Estate Brokers,** University of Minn. Press, 1969, p.229.) In the same year, the Los Angeles Realty Board acquired from the National Association of Real Estate Boards forms for such restrictions, and Los Angeles was one of the cities in California where "practically all subdivisions had restrictions to protect them as far as possible from future depreciation through encroachment of a foreign race." (Idem.) It was, of course, these objectives that the course of decision of the California courts referred to above realized in enforcing the restrictions as mere private agreements.

The "Black Belt" was "consolidated" in Los Angeles by 1940 in the Central Avenue area where "about two-thirds of the Negroes" were concentrated. (Weaver — **The Negro Ghetto,** Harcourt Brace, 1948, pp 63-65.) With the rapid expansion of the black population in the World War II years (at the rate of 78.2%, Idem) the black belt grew heavily in density but only slightly geographically in the south side of the city to include the Central Avenue area, Watts and a small area called "Little Tokyo" which had been evacuated by the forced war-time removal of Japanese residents. (Idem., pp 87-88.) The geographic dimensions of these areas were determined and constrained by the "[w]idespread incidence of race restrictive covenants." (Idem p. 85.)[1]

Following World War II there was a sharp intensification of efforts to promote racial restrictive covenants, the points of emphasis being in the middle income areas surrounding the black belt and in new subdivisions. (Weaver — *op Cit,* p.246.) The California courts continued to enforce those restrictions until this court's decision in **Shelley v. Kraemer** (1948) 334 U.S. 1. Thereupon, in cases pending before the California Supreme Court since before **Shelley,** that court complied with the constitutional imperative there declared. **Cummings v. Hokr** (1948) 31 Cal. 2d 844; **In re Laws** (1948) 31 Cal. 2d 846.

1. Efforts to provide new housing for blacks were effectively blocked by FHA policy which refused to insure loans on homes for black occupancy (Idem pp. 217-218) and which required race restrictions in subdivision deeds of property to be used by Caucasians. (Miller — **A Right Secured,** 166 Nation 599, 1948.) In the latter respect, FHA furnished a model race restriction clause for builders and subdividers during the period 1935-1947. (Idem.)

The enforcement of the racial restrictive covenant over the years prior to 1948 confined the non-Caucasian urban population (and this has historically included those of Mexican descent as well as blacks; see Weaver —*(op cit.)* p. 246; Burns and Harman **The Complex Metropolis**, Part 6 of the **Profile of the Los Angeles Metropolis**, Housing, Real Estate and Urban Land Studies of the Graduate School of Business Administration, UCLA pp. 67, 75) to the ghettos of Central Avenue-Watts and the Eastside. (Weaver — *op cit.*, p.85; Burns and Harman, Ibid.)

So firm had these patterns become that the McCone Commission investigating the factors involved in the Watts Riots of 1965, found that 88.6% of Los Angeles blacks then lived in "Southcentral Los Angeles," that is, Central Avenue-Watts. (**Violence in the City — An End or a Beginning**, Report of the Governor's Commission on the Los Angeles Riots, December 2, 1965, p.75.) That body also found that the geographic expansion of the black population during and after World War II had been prevented and later impeded by the racial restrictive covenants and the segregated residential patterns their enforcement had implanted on the community. (Idem. pp. 76-77.) The racially segregated residential patterns here described were also found in 1967. (Burns and Harman, *op cit.*, p. 75.) And, as observed at the outset of this brief, the same pattern of racial residential segregation was shown by the undisputed evidence at the trial of this action[2] as well as during the

2. The Crawford litigation was begun August 1, 1963. The trial court's findings and order were entered in May 1970. (17 Cal. 3d at 287).

proceedings designed to fashion a desegregation plan in order to implement the mandate of the California Supreme Court in this proceeding. Those patterns, then, are incontrovertibly products of state action in enforcing and imposing the racial restrictive covenant upon the community.

2. The Purposely Racially Discriminatory Effect of Proposition One As Applied to the Existing Residential Segregation by Race.

What has been said so far shows, and indeed there is no dispute about this in these proceedings, that in Los Angeles the dual school system is based upon racially segregated residential areas. (See JA 369.) Since these areas were created by state action, the dual school system resulting therefrom constitutes purposeful segregation resulting from state action within the meaning of **Washington v. Davis,** (1976) 426 US 229, 240, or "intentionally segregative action" as defined and applied in **Dayton Board of Education v. Brinkman,** (1977) 433 US 406, 413. While Respondents here may claim that the Board of Education did not itself create the segregated residential patterns, it is plain that they were created by other state agencies (the courts), and the Board, itself a state subdivision, of necessity included that pattern in its delineation of attendance areas and location of school facilities. Thus is shown its "specific intent to discriminate" (Opinion p. 21A)[3] within **Swann v. Charlotte — Mecklenburg** (1971) 402 U.S. 1.

3. This refers to the opinion below as appended to the Petition for Certiorari.

Nor is this dual school system the fortuitous result of "population movements" (Opinion, p. 36A) resulting from the preferences of individual citizens. It results from carefully fostered residential segregation on racial lines enforced and induced by state action. We submit the Board's school siting and creation of its attendance areas was not mere "passive maintenance . . . in the face of widespread residential imbalance" (Opinion, p. 35A), for it incorporated and built upon the specific segregative intent and discriminatory purposes of the racial restrictive covenants enforced by the state's courts.

But the significance of this plainly purposeful racial segregation and residential pattern bears directly upon the purposes and effects of Proposition One. There are considerable intraurban distances between all or virtually all Black Watts and White or virtually all White San Fernando Valley, just as between the eastside Chicano community and the westside Anglo areas. (See JA 344.) Busing is obviously a necessary tool for achieving the degree of integration necessary to eliminate the dual school system. It is to be assumed that facts of such general knowledge were as well known to the Legislature and the electorate, as to Bustop (Intervenor below) and its allies in the effort to stop "forced busing" which culminated in the adoption of Proposition One. (See **Seattle School District No. 1 v. Washington,** 473 F.Supp. 996, 1015 (WD Wash., 1979) aff'd on other grounds, 633 F.2d 1338 (C.A.9, 1980).California's consti-

tutional amendment, then, was knowingly and purposely directed at depriving non-Caucasians of the remedy of busing in order to achieve desegregation — or at least to impose upon them the burden[4] of proving specific intent to discriminate in order to obtain protection of the state's equal protection clause. This occurred, of course, in circumstances where a judicially found dual school system (established de jure as shown above) was in the process of desegregation using, among other essential tools, busing of students to and from the schools in all the residentially segreagated areas. Those who seek the protection of California's equal protection clause for purposes of eliminating the dual school system have been differentiated from those invoking that clause in other contexts.

From the foregoing, conclusions of determinative constitutional significance are compelling: (1) that racially discriminatory purpose was at least one important motivating factor in the adoption of Proposition One and thus leads to its infirmity under the federal equal protection clause **Village of Arlington Heights v. Metropolitan Housing Development Corporation** (1977) 429 US 252, 265-266, 270 n21; (2) that such purpose is manifest from the "historical context" and the "conditions existing prior" to the adoption of Proposition One as well as the "immediate objective" and the "ultimate effect" thereof and thus offends equal protection within the analysis employed in **Reitman**

4. The massiveness of that burden was recognized in **Keyes v. School District No. 1** (1973) 413 U.S. 189, 234-235, Powell, J. concurring.

v. Mulkey, (1967) 387 US 369, 373. It was for such purpose that the rights of non-Caucasian children to invoke the remedies under the California Constitution were so heavily burdened. The case would therefore seem governed by the principles enunciated in **Hunter v. Erickson,** (1969) 393 US 385 and applied on facts closely apposite here in **Seattle School District No. 1 v. State of Washington,** 633 F.2d 1338, 1344 (C.A. 9 1980).

CONCLUSION

Proposition One should be found to be the vehicle for carrying forward a shameful community pattern of racial segregation and discrimination. It should be held violative of the equal protection clause of the federal constitution and the case remanded to the California courts for purposes of working out reasonable and meaningful integration of the Los Angeles school system.

Respectfully submitted,

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) ss:
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I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 612 North Bush Street, Santa Ana, California 92701.

On December 23, 1981, I served the within BRIEF OF AMICI MEMBERS OF THE BAR OF THE STATE OF CALIFORNIA on the interested parties in said action, by placing a true copy in each of 7 sealed envelopes, with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on December 23, 1981, at Santa Ana, California.

JACK GALLAGHER

MOTION FILED
DEC - 7 1981

No. 81-38

IN THE

Supreme Court of the United States

October Term, 1980

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Appeal from the California Court of Appeal

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF;
BRIEF OF AMICUS CURIAE

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IN THE

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MARY ELLEN CRAWFORD, a minor, etc., et al.,	)
Petitioners,	)
vs.	)
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,	)
Respondent.	)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

California Teachers Association/ National Education Association (hereinafter "CTA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae. The attorneys for petitioners and the attorneys for respondent have given their consents (attached hereto) to CTA for its filing of a brief as amicus curiae.

Applicant's interest in this case is that, as the largest certificated employee labor union in California, having 152,000

members in California and representing 212,000 teachers in their employment relations with California public school districts, it has, from the very genesis of the initiative process which resulted in the amendment of Article I, Section 7(a) of the California Constitution (the "Robbins Amendment" adopted November 7, 1979), through its State Council of Education, its Board of Directors, and its Civil Rights in Education Committee(s), opposed the public policy purpose underlying the Robbins Amendment. That purpose was, and remains, to discourage desegregation of California public schools. More specifically, CTA's intent in this case is to urge the Supreme Court of the United States to find the Robbins Amendment unconstitutional, to the end of affording California's judiciary the power, which it is obligated to exercise under the United States Constitution, to endeavor to remedy segregation in California public schools.

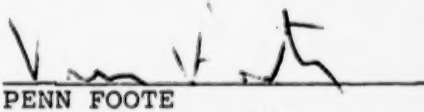
The brief of petitioners herein filed with the California Court of Appeal, in Crawford v. Board of Education of the City of Los Angeles (1980) 113 C.A.3d 633, 170 Cal. Rptr. 495, California Supreme Court hearing denied March 11, 1981, is inadequate in addressing the question of the unconstitutionality of the Robbins Amendment, in that petitioner's brief does not address the problem of the conflict between the Robbins Amendment and the principle of judicial review. Judicial review is the supreme law of the land, within the meaning of that phrase in Article VI of the United States Constitution.

Applicant's brief argues that the Robbins Amendment is in violation of the Supremacy Clause of the United States Constitution in that it takes away from our courts the power of judicial review of the pupil assignment plans; that the doctrine of judicial review, being the supreme law of the land under

Article VI, must attach to the jurisdiction and authority even over California courts with regard to California's constitutional amendments.

Dated: November 25, 1981

Respectfully submitted,



PENN FOOTE
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November 3, 1981

Penn Foote, Esq.
Corporate Counsel
California Teachers Association
1705 Murchison Drive
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RE: Crawford v. Board of Education of the City of Los Angeles, No. 81-38 USSC, Oct. Term 1980

Dear Mr. Foote,

Consent is hereby given on behalf of the petitioners in the above case for the California Teachers Association to file a brief amicus curiae.

Sincerely yours,

Fred Okrand

FO/LH

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Norman Lear*

Vice-Presidents
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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1980

MARY ELLEN CRAWFORD, a minor, etc., et al.,	)
Petitioner,	)
v.	)
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,	)
Respondent.	)

BRIEF OF AMICUS CURIAE

QUESTION PRESENTED

Did the California Court of Appeal err in holding that the amendment of Article I, Section 7(a) of the California Constitution (the "Robbins Amendment") was not unconstitutional? More specifically, is the Robbins Amendment unconstitutional, as being in violation of the Supremacy Clause of the United States Constitution, in that it takes away from the courts of the State of California their power of, and duty to exercise, judicial review?

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INTEREST OF CALIFORNIA TEACHERS ASSOCIATION/NATIONAL EDUCATION ASSOCIATION

California Teachers Association/National Education Association ("CTA") is a non-profit mutual benefit corporation, a labor union, organized under the laws of the State of California and composed of certificated employees who teach in California public schools.

Among CTA's objectives are:

> "To represent employees of public school employers in their employment relations with such employers; /and/
>
> "To further the educational interests of the State of California, to give increasing efficiency to its school system, to secure and maintain for the office of teaching its true rank among the professions of the state, to furnish a practicable basis for united action among those devoted to the cause of education in the state . . ." (California Teachers Association Articles of Incorporation, Article Second)

In accordance with the foregoing general objectives, CTA, through its Board of

Directors, its State Council of Education, and its Board and State Council Committees on Civil Rights, has historically supported the desegregation of black and white pupils in the public schools of California. Pursuant to that latter objective, CTA opposes the passage of the Robbins Amendment (the initiative proposal which, when passed by the voters of California on November 7, 1979, became an amendment to California Constitution, Article 1, Section 7(a)) and continues to oppose in principle the implementation of the Robbins Amendment.

The Robbins Amendment was passed for the express purpose of effecting, and will effect, the handicapping of the courts of California, in their adjudicating of the federal constitutionality of desegregation plans formulated by California school districts.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal in Crawford v. Board of Education of

the City of Los Angeles below, if left undisturbed, would mean that the courts of California would have no choice, in adjudicating school district desegregation plans (which are legislative acts), but to apply the standard for adjudicating the adequacy of such plans which has been adopted by the federal courts. Such a limitation upon the adjudicative duty of the California courts is a denial of the California judiciary's right (and obligation), under the United States Constitution, of judicial review.

ARGUMENT

I

THE PRINCIPLE OF JUDICIAL REVIEW IS AN INHERENT PART OF THE UNITED STATES CONSTITUTION.

In Marbury v. Madison (1803) 1 Cranch 137, 2 L.Ed. 60, Chief Justice Marshall asked the question:

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

> To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed to those intended to be restrained?" (2 L.Ed., 73).

Chief Justice Marshall's question answered itself. But lest there be any misunderstanding, Marshall went on to state: "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it." (Ibid.)

Then followed Marshall's statement of judicial review:

> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on.
>
> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and

interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty." (2 L.Ed., 73-74)

There is a difference of opinion among commentators upon the principle of Marbury v. Madison as to whether or not judicial review of legislative acts is a part of the United States Constitution, or merely Marshall's interpretation of it. Albert J. Beveridge, in The Life of John Marhsall (Houghton Mifflin Co., 1919), noting the Constitutional Convention's "brief and scattering debate" (Vol. III, Beveridge's Life, p. 114), said that no resolution conclusively deciding the question of judicial review was ever even presented to the Convention's members. But of the

proposition that judicial review, with Marbury v. Madison, is an intrinsic part of the United States Constitution, Beveridge had no doubt:

> "Such was the record of the Constitutional Convention when, by his opinion in Marbury v. Madison, Marshall made theprinciple of judicial supremacy over legislation as much a part of our fundamental law as if the Constitution contained these specific words: the SupremeCourt shall have the power to declare invalid any act of Congress which, in the opinion of the court, is unconstitutional." (Id., p. 116).

Beveridge thus speaks of Marshall as "establishing" judicial review (Ibid.).

By way of contrast, Smith, in The Constitution, A Documentary and Narrative History (William Morrow and Company, Inc., 1978) states:

> "What is one to say of Marshall's decision? A piece of intellectual legerdemain? A sleight of hand, or rather of mind? A conjurer's trick? All great art may be said to contain something ofthe trickster, the magic illusionist. Marbury v. Madison is perhaps the most famous case in American constitutional history, rivaled only by the Dred Scott decision and,

in modern times, Brown v. Board of Education. It was not that Marshall established some new constitutional principle. The Court had already in Hayburn's Case stated that laws passed by Congress contravening, in the opinion of the justices, the Constitution, were invalid." (Smith, The Constitution, p. 322).

Edward S. Corwin, John Marshall and The Constitution, A Chronicle of the Supreme Court (Vol. 16, The Chronicles of America Series, Abraham Lincoln Edition, Allen Johnson, Editor, Yale University Press, 1919) says:

"Every one of his arguments in this opinion in support of judicial review will be found anticipated in the debate on the Repeal Act. What Marshall did was to gather these arguments together, winnow them of their trivialities, inconsistencies, and irrelevancies, and compress the residuum into a compact presentation of the case which marches to its conclusion with all the precision of a demonstration from Euclid." (Corwin, op. cit., p. 67).

And:

"There is not a false step in Marshall's argument. It is, for instance, not contended that the language of the

> Constitution establishes judicial review but only that it 'confirms and strengthens the principle.'" (Corwin, ibid.)

But whether "invented" with Marbury v. Madison, or "presented" in that case, the doctrine of judicial review is a part of our fundamental law, fully as though specifically set forth in the United States Constitution (16 C.J.S., Constitutional Law, Section 92).

II

JUDICIAL REVIEW IS THE SUPREME LAW OF THE LAND, WITHIN THE MEANING OF THAT PHRASE IN ARTICLE VI OF THE UNITED STATES CONSTITUTION.

The Supremacy Clause, Article VI of the United States Constitution, reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Inasmuch as judicial review is an inherent part of the United States Constitution, and the Constitution is the supreme law of the land, it follows that judicial review is the

supreme law of the land. Even standard California authority recognizes this to be so:

> "Generally, under the doctrine of separation of powers, nonjudicial bodies may not exercise judicial powers, nor may the courts exercise nonjudicial powers. However, although the legislative and executive departments of government may not interfere with the functions of the judiciary, it nevertheless is the province of the courts, as the ultimate guardians of the constitution, to nullify unconstitutional enactments of the legislature, as well as executive actions taken under the authority of such unconstitutional enactments. (16 Cal.Jur.3d, Courts, Section 19, at p. 37 /citations omitted/)

III

THE PRINCIPLE OF JUDICIAL REVIEW, BEING THE SUPREME LAW OF THE LAND UNDER ARTICLE VI OF THE UNITED STATES CONSTITUTION, MEANS THAT CALIFORNIA COURTS HAVE THE DUTY INDEPENDENTLY TO JUDGE THE FEDERAL CONSTITUTIONALITY OF CALIFORNIA LEGISLATION.

Not even by their democratic initiative process (whereby Californians themselves undertake to amend their State Constitution) may the voters of California deprive the courts of California of the obligation of those courts, under the Supremacy Clause of

Article VI (as it incorporates judicial review), to judge.

Garry Wills, in Explaining America: The Federalist (Doubleday & Company, Inc., 1981), writes:

> " . . . Madison argues in The Federalist for a view of fundamental law that entails judicial review of necessity. He does this in No. 53.
>
> "At the end of No. 52, Madison makes a surprising remark--surprising because it seems to take away supremacy with one hand while bestowing it with the other:
>
> " . . . the Foederal Legislature will possess a part only of that supreme legislative authority which is vested completely in the British parliament (52.358).
>
> "This not only raises the classical sovereignty question--how can supremacy be partial? It might also cause one--since the legislature and the legislative power are at times used synonymously in The Federalist--to look for some partial sharing of supremacy on the part of the executive or the judiciary." (Explaining America, at 156).

Wills then explains that in America (vs. England) the Constitutional Convention ("ratifying convention"), passed the

Constitution ("fundamental law"), such that the Congress (or any other legislative body) cannot alter the Constitution. Wills expresses it thusly:

> "Fundamental law is superior in its claims to mere statute. Yet there will be no way of asserting that paramountcy if the Court does not decide between new laws and the fundamental law. Who else is to judge? . . ." (Explaining America, supra., at 157).

Unhappily, this profound distinction--"so well understood in America"--is not understood in California. By the Robbins Amendment, Californians have "changed . . . /one/ of the most fundamental articles of the government"--the principle of judicial review, as set forth in Marbury v. Madison.

It is no defense of the Robbins Amendment that it was passed by the voters of California, through the initiative process. California Constitution is not a "paramount constitution." (Reitman v. Mulkey (1967) 387 U.S. 367) The only paramount constitution is the United States Constitution, and a

California constitutional provision which is repugnant to the United States Constitution must fall.

IV

THE ROBBINS AMENDMENT TAKES AWAY FROM THE COURTS OF CALIFORNIA THEIR DUTY, AND POWER, TO JUDGE THE FEDERAL CONSTITUTIONALITY OF STATE LEGISLATION.

"ARTICLE 1. DECLARATION OF RIGHTS.

"Section 7. Due process and equal protection; pupil school assignment and transportation

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws, provided, that nothing contained herein or elsewhere in this Constitution imposes upon theStateofCalifornia or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a

> violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court wouldbe permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution." (170 Cal.Rptr., at 497)

By the above provision, the California Constitution purports merely to limit the power of California courts to fashion remedies for school segregation. But since courts exist, not merely to render fine-spun declarations of rights, but to adjudicate rights and enforce them, the Robbins Amendment's limitation upon the courts' power to formulate remedies is, in truth, a limitation upon the courts' power of acting as courts. In mandating that California courts (with respect to the school desegregation) shall exist for no purpose other than to mirror the desegregation decisions of federal courts, the Robbins Amendment destroys the very essence of

judici-l review--the power, and obligation, to apply the Constitution of the United States to school district desegregation plans and (if such be the case) find such plans unconstitutional under the United States Constitution.

No one can seriously dispute the fact that the Robbins Amendment was passed by the voters of California for the very purpose of destroying the de facto standard of adjudicating school district desegregation plans which the California Supreme Court fashioned in Crawford I (see 113 C.A.3d, 647; 170 Cal.Rptr., 504

But for the power of the Supreme Court of the United States to hold unconstitutional the Robbins Amendment, that amendment will succeed in having proved W. E. Burghardt Du Bois wrong, when he said:

> "I believe that all men, black and brown and white, are brothers, varying through time and opportunity, in form and gift and feature, but differing in no essential particular, and alike in soul and the possibility of infinite development.*

"*From Darkwater by W. E. B. Du Bois (New York: Harcourt, Brace & World, 1920; reprinted by Schocken Books, New York, 1969)." (As quoted in Mary White Ovington, The Walls Came Tumbling Down (Harcourt, Brace & World, 1947, Schocken Paperback Edition, 1970, at p. 299).

CONCLUSION

If the independence of the California judiciary, required by the United States Constitution, is to be restored in the area of school desegregation, the Robbins Amendment must be struck down.

Omnia alia perfugia bonorum, subsidia, consilia, auxilia, jura ceciderunt. Quem enim alium appellem? quem obtester? quem implorem? Nisi hoc loco, nisi apud vos, nisi per vos, judices, salutem nostram, quae spe exigua extremaque pendet, tenuerimus; nihil est praeterea quo confugere possimus.

Dated: November 25, 1981

Respectfully submitted,

PENN FOOTE
Counsel for California Teachers Association

PROOF OF SERVICE--AFFIDAVIT

I, PENN FOOTE, Corporate Counsel of the California Teachers Association, am the attorney of record for amicus curiae herein.

I depose and say that on the 27th day of November, 1981, I served a copy of the foregoing Application For Leave To File Amicus Curiae Brief and Brief of Amicus Curiae on the parties named below, by mailing the same to the individuals named below, at the offices and addresses stated below.

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PENN FOOTE

SUBSCRIBED AND
SWORN TO before me
this ___ day of November, 1981.

Office - Supreme Court, U.S.
FILED
JAN 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-38

In the Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, etc., et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondents.

BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MAY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association,
Intervenors.

Request for Permission to File Brief *Amicus Curiae* in Support of Respondents

and

Brief *Amicus Curiae* in Support of Respondents

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No. 81-38

In the Supreme Court of the United States

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Intervenors.

Request for Permission to File Brief *Amicus Curiae* in Support of Respondents

and

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the Citizens Legal Defense Alliance, Inc. moves this Court for permission to file a Brief *Amicus Curiae* in the above entitled case in support of the Respondents. Pursuant to Rule 36.2 of the Rules of the Supreme Court of the United States, this motion is accompanied by the written consent of all parties to this case.

The Citizens Legal Defense Alliance, Inc., a California non-profit public interest law foundation, comprised of several thousand members, being familiar with the issues involved and the scope of their presentation, believes that there is a necessity for additional argument on the questions presented herein.

Interest of *Amicus Curiae*

The interest of the Citizens Legal Defense Alliance, Inc. is twofold: first, that of protecting those of its members, as well as the general public, who are parents of students attending the schools under the jurisdiction of the Los Angeles City Board of Education (its correct designation) from the forced transportation of their children to schools distant from their homes; and, second, to uphold and preserve Article 1, Section 7(a), of the Constitution of the State of California.

Amicus Curiae believes that the Petitioners in the instant case are attempting to have the said Article declared unconstitutional, rather than electing to seek its repeal by the simple process provided by the said Constitution, itself.

The Citizens Legal Defense Alliance, Inc., respectfully requests that this Court grant it permission to file the attached Brief *Amicus Curiae*, copies of which have been served upon all parties to the case.

Dated: January 14, 1982

Respectfully submitted,

ROBERT H. FINCH, Attorney for
Citizens Legal Defense Alliance, Inc.

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No. 81-38

In The

In The Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondents.

BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MARY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association,

Intervenors.

Brief *Amicus Curiae* in Support of Respondents

Interest of *Amicus Curiae*

The Citizens Legal Defense Alliance, Inc. (CLDA), has a particular and special interest in the above-titled litigation, in that it is comprised of several thousand members, the vast majority of whom are citizens and taxpayers of the County of Los Angeles, State of California; the CLDA, itself, is a taxpayer in the said County, and in the Los Angeles Unified

School District, even though it is exempt from State and Federal taxes under Section 501(c)(3) of the Internal Revenue Code, and Section 23701d of the California Revenue and Taxation Code; the CLDA, including its members, are gravely concerned that Article 1, Section 7(a), of the Constitution of the State of California might be overturned against their wishes and the wishes of two-thirds of the general public, although it is in compliance with Amendment XIV of the Constitution of the United States; and, the CLDA seeks to protect all parents of students of all races from the needless transportation of their children, at times over great distances, without any compensating benefit to them, individually or collectively.

The Los Angeles Unified School District never has been segregated by any definition of that term

> "Segregation. The act or process of separation. The unconstitutional policy and practice of separating people on the basis of color, nationality, religion, etc. in housing and schooling." *Black's Law Distionary*, Fifth Edition (1979).

There is no segregation unless some force (by law, or otherwise) has been brought to bear to separate people. No such force was applied by the Los Angeles City Board of Education (its correct designation), which has jurisdiction over the Los Angeles Unified School District, at any time.

No court in California has found that the said Board acted to separate students unconstitutionally along racial lines. Although both the Superior Court and the State Supreme Court stated that the Board was guilty of so-called *"de jure"* segregation, no positive act of the Board to separate students racially was charged.

> "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate." *Keyes v. School District No. 1*, 413 U.S. 189, 208 (1973).

Thus, by this Court's own definition, there must be a purpose or intent to segregate, which agrees, in essence, with the definition given in *Black*. It has never been held that the Board has demonstrated any purpose or intent to segregate its students.

Compulsory Busing Imposes a Burden of Remedial Action Upon Those Innocent of Any Wrongdoing

> "The compulsory transportation of students carries a further infirmity of a constitutional remedy. With most constitutional violations, the major burden of remedial action falls on offending state officials. Public officials who act to infringe personal rights of speech, voting, or religious exercise, for example, are obliged to cease the offending act or practice and, where necessary, institute corrective measures. It is they who bear the brunt of remedial action, though other citizens will to varying degrees feel its effects. School authorities responsible for segregation must, at the very minimum, discontinue segregative acts. But when the obligation further extends to the transportation of students, the full burden of affirmative remedial action is borne by children and parents who did not participate in any constitutional violation." *Keyes, supra*, at 250. Opinion of Justice Powell, concurring in part and dissenting in part.

If, as Mr. Justice Powell states, busing places an unfair burden on students and parents, even where a dual school system exists, how much more unfair is it to impose such a burden where no state action has occurred to create a racial imbalance.

Of the 555 schools in the Los Angeles Unified School District, only seven were populated by students of a single race; all other schools had some racial mixture. It would be stretching the meaningful use of language to hold that the District is segregated.

The true description of a segregated school district was this:

> "In each instance, they [black children] have been

denied admission to schools attended by white children under laws requiring or permitting segregation according to race." *Brown v. Board of Education*, 347 U.S. 483, 487, 488 (1954).

A school in which there exists a racial mixture depending only on the racial balance of the neighborhood in which it is located, cannot be classified as segregated.

A Provision of a State Constitution That Conforms to a Provision of the Constitution of the United States Cannot Be Called Unconstitutional

The clause in question of the Constitution of California, as it applies to this case, is Article 1, Section 7(a). It reads:

> "[N]othing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil assignment or pupil transportation. In enforcing this subdivision . . . no court of this state may impose upon . . . any . . . board, or official, any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation."

Exceptions to the above are (1) to remedy a specific violation that would also be a violation of the Fourteenth Amendment, and (2) unless a Federal Court would find such a violation and, therefore, impose the remedy of busing.

No acusation of a violation of the Constitution of the United States by Article 1, Section 7(a), of the Constitution of California can have any standing in law or in fact, since both the State and Federal Constitutions are in agreement on the point at issue herein.

The Amendment of the Constitution of California Has Opened the Way for the Supreme Court of the United States to Acquire Jurisdiction in this Matter

The trial court (Judge Gitelson) and the California Supreme Court avoided any reliance upon the Fourteenth Amendment, basing their decisions solely on the California Constitution. For that reason, since no Federal issue was raised, no appeal to the Federal Courts could be taken.

However, under the amended Article 1, Section 7(a), this Court now has jurisdiction, and previous rulings of this Court should prevail. This Court has never held that a simple and blameless racial imbalance is an actionable violation of civil rights.

Quotas May Not Be Used to Determine the Degree of Integration Required in Schools

In its 1976 decision in *Crawford v. Board of Education*, 17 Cal. 3d 290, the California Supreme Court held:

> "While we affirm the trial court's order requiring the defendant board to prepare and implement a reasonably feasible desegregation plan, we shall point out that one portion of the judgment, defining "segregated" schools in terms of specific racial and ethnic percentages, is in error and must be modified on remand."

In spite of this clear ruling, Judge Egly (successor to Judge Gitelson in the case) has inserted a quota system into his integration plan. In his "Intended Order," dated May 19, 1980, Judge Egly gave his "Definition of a Desegregated School." He stated:

> "As discussed earlier in this order, it is the court's intention to adopt as a working definition of a desegregated school containing only two racial/ethnic groups, one with a simple majority of white students, plus or minus 10%. In those areas where there are sufficient numbers of minority groups and the practicalities of the situation make it reasonable and feasible, the court intends to adopt a definition of a multiethnic desegregated school which would require a plurality of white children, plus or minus 5%, over the largest of any of the minority groups present. The white complement in a desegre-

gated school may not exceed 10% more than a majority in a biethnic school or 5% more than a plurality in a multiethnic school." Text published by *Los Angeles Daily Journal*, at 72.

Receiving the case on remand from the California Supreme Court, with its ban on the use of racial and ethnic quotas in desegregating the Los Angeles schools, Judge Egly had, notwithstanding, proceeded to adopt such quotas. And, even as he set his quotas, he admitted that the student population of the district was: white, 27%; black, 24.1%; Hispanic, 41.8%; and Asian, 6.7%. (Ibid., p. 57). It is mathematically impossible to have a majority, or even a plurality, of white students in schools in which 73% of the student population is made up of so-called "minorities."

In any event, the rule in *Bakke* prohibits any use of quotas:

> "For this reason, so much of the California court's judgement holding petitioner's special admissions program [based on quotas] invalid under the Fourteenth Amendment must be affirmed." *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Conclusion

For the reasons set forth in this Brief *Amicus Curiae*, the Citizens Legal Defense Alliance, Inc., respectfully requests that this Court find in favor of the Respondent Board of Education of the City of Los Angeles, and deny the Petitioner's appeal.

Dated:
January 14, 1982

Respectfully submitted,

Robert H. Finch, Attorney for
Citizens Legal Defense Alliance, Inc.

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No. 81-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, ETC., ET AL.,
Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

BRIEF FOR HONORABLE BOBBI FIEDLER, MEMBER OF CONGRESS AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the passage of Proposition 1 constitutes state action that effects an inherently suspect class in such a manner as to cause that class to suffer a federally cognizable wrong.

2. Whether fundamental principles of federalism protect states in the exercise of their right to experiment with the expansion and retraction of privileges that at no time contravene the requirements of the United States Constitution.

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BRIEF IN SUPPORT OF THE JUDGMENT OF THE CALIFORNIA COURT OF APPEAL SECOND APPEALLATE DISTRICT

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Amicus incorporates by reference Respondent's statement of the case.

ARGUMENT

INTRODUCTION AND SUMMARY

Petitioners assert that this case is only superficially concerned with the mandatory transportation of students. (Petitioner's brief, hereinafter for Pet. at 30) With this, *amicus* heartily concurs. For although the facts giving rise to this case concern the integration of the Los Angeles school system, the present procedural posture of the instant case addresses the singular question of whether or not the United States Constitution permits a state to change its laws so as to bring them into conformity with the United States Constitution.

Petitioners, breathtakingly, answer that question in the negative. (Pet. at pp. 96-98) Of course, Petitioners wisely do not phrase the issue in that form. Rather, after first noting that this case is only superficially about mandatory transportation of students, petitioners proceed to entomb their analysis in the full panoply of mandatory student transportation law, down to the last arcanum.

A clear analysis of the instant case must start with a brief overview of the decision below by the California Court of Appeal, reported at 113 Cal App. 3d 633, 170 Cal Rptr. 495 (1980). There, the court held that Proposition 1 was constitutional and that the trial court's desegregation plan violated Proposition 1 because the record did not contain any evidence of intentional, *de jure* segregation of students. Petitioners have not challenged the finding of no *de jure* segregation. Nor does the record disclose any.

Thus we reach the first central point to keep in mind throughout this case: at no time has the Los Angeles School

Board committed or omitted an act which would constitute a violation of the Fourteenth Amendment to the United States Constitution.

Rather, the California courts had held that, based on the California Constitution, not the United States Constitution, a remedy should be provided if reasonable and feasible, to correct even *de facto* segregation. *Crawford v. Board of Education,* 113 Cal 3d 633.

During the protracted pendency of that litigation, specifically during the early stages of a six month trial to determine the remedy required by the California Constitution, Proposition 1 was passed by the California Electorate by a two to one majority.

In summary essence, Proposition 1 expressly conformed California Constitutional law regarding mandatory student transportation to the requirements of the United States Constitution, with the exception that it still permitted mandatory student transportation for purposes of desegregation if a school board voluntarily chose it.

It is the position of *amicus* that the determinative proposition of this case is that the passage of Proposition 1 does not impose a federally cognizable burden on any person or group of persons. Moreover, *amicus* submits that — absent any federally cognizable burden — evidence or inferences regarding the supposed subjective intent of the collective electorate of Proposition 1 is irrelevant.

Although the instant case hinges on this one unambiguous point, the decision in this case will have sweeping implications for the future of federalism. Thus, in the discussion of question two, *amicus* will review the importance of allowing flexibility in the several States when they experiment with different legal approaches to resolving the pressing social challenges facing the country.

I

THE PASSAGE OF PROPOSITION 1 DOES NOT EFFECT AN INHERENTLY SUSPECT CLASS IN SUCH A MANNER AS TO CAUSE MEMBERS OF THAT CLASS TO SUFFER A FEDERALLY COGNIZABLE WRONG.

Petitioners' assault on Proposition 1 is premised on the assertions that; 1) on its face it embodies an impermissible racial classification; and, 2) that both its purpose and effect is to disproportionately affect a racial minority. Thus petitioners reason, only a compelling state interest will justify such an act. And, of course, petitioners assert that no such compelling interest is presented. (Pet. at pp. 34, 54, 63, 64)

Amicus submits that Proposition 1 is racially neutral, and that more significantly, petitioners are never able to identify a federally cognizable wrong that results from the passage of Proposition 1.

Initially, it may be helpful to lay out each of the elements of the point of law that petitioners are attempting to assert. The fourteenth amendment was enacted, in large part to vindicate the rights of the Negro population and restrict discriminatory actions by state governments in a variety of contexts. Thus, any state statute that involved racial classifications was subjected to "strict scrutiny". (See *Slaughter-House Cases,* 83 U.S. 36, 67-72 (1873)).

An explicit racial classification that significantly disadvantages members of that racial classification can only be justified by a compelling state interest. *McLaughlin v. Florida,* 379 U.S. 184 (1964).

If the classification is not explicit, then it may be proved by its disproportionate racial impact. *Wright v. Council of City of Emporia,* 407 U.S. 451 (1972). The racial classification may also be proved by the intent or motive or purpose behind it. *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). Moreover, the impact may be evidence of the intent, although impact alone does not trigger the compelling interest rule. *Washington v. Davis,* 426 U.S. 229 (1976). Even if the disproportionate impact is foreseeable, that alone will not be determinitive. *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973).

But irrespective of how the racial classification is invoked (expressly on its face, by showing intent, by showing effect, or some combination) it is axiomatic that not only must the consequence be quantifiably disproportionate in its effect on a racial group, it must also be of a quality that creates a burden on this group that is legally cognizable in the court in which the plaintiff is asserting the wrong.

Although this may seem obvious, it is a step in the analysis of a challenged state action that is often taken for granted. In the setting of school desegregation cases the critical search is usually not for the harm (ie, segregation), but for the state action that may have caused it. Indeed, the very language used to dichotomize such cases, *de facto* and *de jure,* addresses the presence or absence of causative state action. The harm of segregation is taken for granted.

Thus, in *Brown v. Board of Education,* 347 U.S. 483 (1954) the key to the Courts analysis was separate school systems for the different races. In *Arlington Heights, supra,* this court was looking for evidence of abnormal process to show intent and thus state action. See also, *Keys v. School District No. 1,* 413 U.S. 289 (1973); *Green v. County*

School Bd., 391 U.S. 430 (1968); and *Swann v. Charlotte-Mecklenburg Bd. of Educ.* 402 U.S. 1 (1971).

In the case at bench, however, the relevant search is not for the state action, but for the federally cognizable harm. Obviously the enactment of a state constitutional amendment is a state action. And although *amicus* vigorously asserts that the enactment of Proposition 1 was not motivated by any improper motives (*amicus* joins in the admirable defense by respondent and the court below on this point), nonetheless, *amicus* respectfully submits motive is irrelevant if there is no federally cognizable harm.

At the risk of stating the obvious, in a hypothetical case where a statute states on its face the intent to harm a racial minority, if instead the result is to benefit that minority, then the fourteenth amendment could not be invoked because there would be no wrong to remedy. As this Court has held in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* a federal remedial power may be exercised "only on the basis of a constitutional violation" and "(a)s with any equity case, the nature of the violation determines the scope of the remedy." 402 U.S. at 16.

In *Milliken v. Bradley,* 418 U.S. 717, 744 (1973), this Court stated with great clarity the established rule:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation."

And, indeed, if there is no constitutional violation, there is no remedy:

> "To approve the remedy ordered by the Court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I and II or any holding of this Court." 418 U.S. at 745.

Thus, *amicus* submits that unless petitioners can demonstrate the federally cognizable constitutional harm that resulted from the passage of Proposition 1, petitioners' case must fall.

Petitioners describe the alleged harm thusly:

> "By amending its constitution so as to withhold the full panoply of otherwise available state court remedies from those—and only those—who challenge racial separation in violation of the state's own laws, the State of California has created not a dual *school* system (although such a system might be the result) but a dual court system: a first class judicial system for whites and for problems unrelated to race, and a second-class judicial system, its remedial capacity radically restricted, for minorities and for problems of racial isolation." (emphasis in original) (Pet. at pp. 30-31)

In other words, petitioners are asserting that the United States Constitution, as authoritatively interpreted by this Court, is "second class" (Pet. at p. 31). It is ironic to note that petitioners now appeal to this "second-class" (Pet. at p. 31) judicial system to admit its inferiority and to make such admission by overruling the "first class" judicial system's (i.e., the California Courts) rejection of petitioner's claim.

Initially, it needs to be noted that petitioners misconstrue the express language of Proposition 1, which misconstruction undermines the basis for their contention. Petitioners state: "Proposition 1 is directed against court-ordered student assignment only when student assignment is ordered for the purpose of desegrating the public schools. Mandatory student assignment for any other purpose—such as relieving overcrowded schools or fulfilling the educational rights of handicapped children—remains untouched." (Pet. at p. 45, note 25)

Petitioners are wrong. Proposition 1, as quoted in petitioners' own brief at pages 4-6 states in relevant part:

> ". . . provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State . . . . any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment . . . with respect to the use of pupil school assignment or pupil transportation. . . ." Article 1 sec. 7a para. 1 California Constitution.

There is no mention of purposes of desegregation, as petitioner claim (Pet. at p. 45 note 25). Moreover, in paragraph 4 of proposition 1, as quoted from petitioners brief at page 6, is the following language:

> "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision."

Thus, if anything, power in excess of the 14th Amendment is granted back to school boards to voluntarily choose to require busing, but not for other purposes such as helping handicapped children or overcrowded schools. So if anything, busing for integration is benefited as against busing for other purposes.

Petitioners attempt to get around this glaring hole in their argument by justifying their patently wrong interpretation of Proposition 1 with the claim that respondent and the court below both interpreted. Proposition 1 the way petitioners do. (Pet. at pp. 35-36; 42 note 23)

Though facile, this claim is not convincing. The language cited by petitioners in the opinion of the court below (113 Cal App3d at 653) involved that Court analysing Proposition 1 in contrast to Proposition 14 (See *Reitman v. Mulkey,* 387 U.S. 369 (1967)). The Court below was not addressing the question of whether Proposition 1 limited its

restriction to "purposes of integration". Thus its language cannot be construed as an authoritative construction regarding that issue.

Likewise, the reference to respondent's "concession", is inapt. Respondent was merely making a contrasting point to an overstated claim of petitioners on a different point. (Brief in Opposition to Petition for Writ of Certiorari, p. 9).

This misconstruction of Proposition 1 by petitioners substantially damages their argument comparing the instant case to *Hunter v. Erikson,* 393 U.S. 385 (1969) (see discussion, *infra*).

Petitioners' claim of damage, is essentially that the remedy that may have been available under the pre-Proposition 1 California Constitution to vindicate the state-court-cognizable harm of de facto segregation is no longer available.

But this point is unconvincing because it is well established that:

> "The question of whether a rescission of previous Board action is in and of itself a violation of appellant's constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took.... If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation." *Reitman v. Mulkey*

387 U.S. 369 (1967), quoted approvingly in *Dayton Board of Education v. Brinkman,* 433 U.S. 406 at 414 (1978). (See also *Hunter v. Erickson, supra,* wherein it was held that "We do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment," at p. 390, note 5)

Neither can petitioners find support in *Reitman v. Mulkey, supra,* as they imply. (Pet. at pp. 66, 90). In *Mulkey* this Court found California Proposition 14 un-

constitutional. But there, the question was not whether equal protection was being violated by the removal of a statute, but whether state action could be found to have a close enough nexus to activities which were patently in violation of the equal protection clause. In the case at bench, of course, the rescission of an existing state law exposed all parties to the express protection of the Fourteenth Amendment, not to its violation.

Petitioners' reliance on *Hunter v. Erickson, supra,* is misplaced for two reasons. In *Hunter,* the repeal of the existing law exposed minorities to unequal protection of the law in housing, a circumstance which is itself in violation of the Fourteenth Amendment. Thus, *Hunter* is similar to *Mulkey, supra,* where the state action of repealing a law exposed minorities to violations of the Fourteenth amendment. Once again, in the case at bench, the removal of the existing law exposed minorities to the protection of the Fourteenth Amendment.

Moreover, it is in this situation that petitioners' misconstruction of Proposition 1, discussed, *supra,* bears further against their contention. Petitioners attempt to find themselves similarly situated to the plaintiffs in *Hunter* on the basis that the restrictions on mandatory busing that result from the passage of Proposition 1 are greater for those who seek mandatory busing for integration than for those who seek it because of overcrowded schools or for helping handicapped children. (Pet. at pp. 30-31, 45).

But because petitioners misconstrued Proposition 1 on this point, they are denied what ever benefits of argument they thought they may have gained in the context of *Hunter v. Erickson, supra,* 393 U.S. 385. (see also *James v. Valtierra,* 402 U.S. 137, 140-141 (1970), wherein this Court narrows the application of *Hunter*).

Thus the law is clear that the mere removal of an existing state law does not, in and of itself, constitute a violation of the Fourteenth Amendment. Rather, only if that removal exposes the plaintiffs to a violation of the Fourteenth Amendment, is there a federally cognizable harm. In the case at bench, the mere removal of a state law exposed the plaintiffs to no more than the express protection of the Fourteenth Amendment.

Moreover, the foregoing propositions of law have been recently applied to an almost identical situation as in the instant case. In *Brown v. Califano,* 627 F.2d 1221 (D.C. Cir. 1980), the respected Senior Circuit Judge Bazelon was called to rule on whether the equal protection clause of the Fourteenth Amendment was violated by a Congressional amendment that withdrew from HEW the right to threaten cut-off of funds to local school districts that did not implement mandatory busing under certain circumstances.

There, as in the instant case, plaintiff claimed that such an action "inhibited desegregation" by removing one of the means to do so. 627 F.2d at 1229. Judge Bazelon held that the intent of the amendment was "to ensure that mandatory busing orders derive either from local officials or federal courts." id at 1231. This is remarkably similar to the effect of Proposition 1 in that Proposition 1 allows mandatory busing ordered either by the Federal Court or at the choice of a local school board.

Judge Bazelon went on to hold that the amendment would be constitutionally flawed if it "diluted rather than enforced equal protection guarantees." id. p. 1233. But, he went on, "As the amendments also leave in place the enforcement options at the Department of Justice, we cannot find that on their face they restrict, abrogate, or dilute the guarantee of equal protection." id. at 1234. Similarly, the full powers of

the federal Justice Department and the federal courts are available to enforce the Fourteenth Amendment in California.

Finally, in the instant case in September 1980, Justice Rhenquist analyzed the constitutionality of Proposition 1 in the following language:

> ". . . inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of (the) federal constitution."

Board of Education of City of Los Angeles v. Superior Court, 448 U.S. 1343, 1345 (1980).

Amicus concurs. An uncontradicted body of this Court's decisions holds that the mere removal of a state law that yields all parties the unlimited protection of the Fourteenth Amendment is not a violation of the Fourteenth Amendment, and thus does not expose petitioners to any federally cognizable wrong.

II

FUNDAMENTAL PRINCIPLES OF FEDERALISM ENCOURAGE STATES TO EXERCISE THEIR RIGHT TO EXPERIMENT WITH THE EXPANSION AND RETRACTION OF PRIVILEGES AS LONG AS THEY DO NOT CONTRAVENE THE REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

This Court declared, shortly after the close of the Civil War, that the formation of the United States:

> "by no means implies the loss of distinct and individual existence, or the right of self-government by the States . . . (T)he preservation of the States, and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."
> *Texas v. White,* 74 U.S. (7 Wall.) 700, 725 (1868).

This classic expression of the ideal of dual sovereignty uttered by this court at a time when many of our states had good reason to doubt their function, continues to hold wisdom today. Just as the Civil War raised doubts as to the proper role of the States in the federalist form of government, so today, the States are uncertain of the scope of their sovereignty.

The statesman and scholar Archibald Cox recently raised this question regarding this Court's then pending decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978):

> "The Court will not fully canvass that question however, unless it also considers whether our constitutional philosophy calls for a monolithic judgment by the national judiciary or for leaving the difficult problem of affirmative action to smaller and varied solutions likely to be produced by fifty different states." Cox, "Federalism and Individual Rights Under the Burger Court", 73 *Nw Law Review* I (1978).

A similar point was made by Mr. Justice Brennan in the following language:

> "The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."

Brennan, *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977).

Thus, the too-ready intervention by federal courts may tend to stunt the growth of state constitutional law by curtailing opportunities for state adjudication.

The vitality of the federalism system resides in the opportunity for fifty separate governments to try fifty different approaches to solving the common problems that face the nation as a whole. As in all human endeavours, mistakes will be made. False paths will be followed. Dead ends will be reached.

But it is a maxim of human achievement that one must fail many times before succeeding. If there is fear of failure, there is little chance for success. As it is true in individuals, so it is true in governments.

The genius of federalism is that each mistake hurts only one state, yet each success benefits the entire nation.

The case at bench brings these propositions in to vivid relief. Virtually every state today faces the challenge of bringing social justice, in all its facets, to those who suffer from its absence. At the same time, the overburdening demands on the public treasury require that we addess these social challenges in inventive, practical and economic ways.

Several years ago California tried to address one of those problems by going beyond the requirements of the Fourteenth Amendment and seek possible remedies to the problem of *de facto* segregation. But as time passed, and as

the resource base of the public sector was reduced, it became more and more apparent to Californians of every race and ethnic background, that the experiment was not working, and that the resources were needed to provide minimum state services.

Thus Californians overwhelmingly chose to return to the wisdom of the United States Constitution, a wisdom born of generations of careful balancing and measuring. Superior justice is not always the most extreme. This court has even found it necessary to limit freedom of speech in rare cases, believing correctly that justice was thereby better served. *American Communications Assoc. v. Douds,* 339 U.S. 382 (1950).

To the end of encouraging experimentation amongst the states in areas that do not contravene the United States Constitution, *amicus* submits that this Court should be guided by its words in *Texas v. White, supra* and by the advise of Mr. Justice Brennan in the above cited article, and keep open the doors to the United States Constitution to all those states which, from time to time, may dare to leave its comfort and security for the invigorating but sometimes inhospitable air of unknown mountain tops. In other words, the general States must be allowed to contract, as well as expand, their Constitutions, as long as they do not contravene the U.S. Constitution.

If this court were to hold otherwise, such a ruling would have a chilling effect on the future innovations and experiments of the fifty states, and could only be expected to reduce experimentation in favor of suspect classes in the future.

CONCLUSION

For the foregoing reasons the judgment of the California Court of Appeal second appeallate district should be affirmed.

Respectfully submitted.

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v.
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE, IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

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INTEREST OF AMICI CURIAE

The San Francisco Lawyers' Committee for Urban Affairs ("S.F. Lawyers' Committee") began in 1968 as the Northern California affiliate of the Lawyers' Committee for Civil Rights Under Law. It is organized as a California nonprofit corporation and is classified as a tax-exempt public charity under Section 501(c)(3) of the Internal Revenue Code. The Committee's program involves the provision of *pro bono* legal representation to poor or minority individuals. Its most recent activities include participation in various suits concerning racial isolation in elementary and secondary schools in the San Francisco Area. The Committee also was active in the

campaign against the enactment of Proposition 1,[1] which is at issue in this case, and has remained involved in subsequent legal challenges to its constitutionality.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Over the past eighteen years, the Committee has enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education (including school desegregation cases), employment, housing, municipal services, the administration of justice, and law enforcement.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a private civil rights organization founded in 1968, and dedicated to ensuring through law that the civil rights of Mexican Americans are protected. It has participated in numerous cases involving the educational rights of Mexican American children, including school desegregation cases.

Based on their respective experiences in representing poor and minority clients on civil rights issues, in particular regarding public education, *amici* file this brief in support of petitioners.[2]

SUMMARY OF ARGUMENT

The drafters of Proposition 1 wanted it to appear to be merely a neutral regulation of remedies which California state courts may use in certain school desegregation cases brought under the California Constitution. They failed to obscure its true purpose. In fact, the measure violates a fundamental precept of the four-

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[1] CAL. CONST. art. I, § 7(a) (hereinafter cited as "Proposition 1").

[2] The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 36.1.

teenth amendment: it purposefully isolates a particular class of citizens on the basis of their race (minority students seeking racial integration of California public schools), and singles that class out for disfavored treatment by the state judiciary.

Amici join with the petitioners in urging this Court to reverse the California Court of Appeal's judgment sustaining the constitutionality of Proposition 1, and they embrace fully the arguments to this end made in petitioners' brief. Amici submit this brief to draw the Court's attention to certain arguments against Proposition 1 which we think deserve particular emphasis and clarification. To that extent, this brief will not restate all of the points made in petitioners' brief, but will focus on four distinct arguments.

First, *amici* will demonstrate that in addition to its facial infirmities, Proposition 1 was passed with a specific intent to discriminate against black and other minority school children in California. We will draw the Court's attention to certain material, both in the record and judicially noticeable, showing that Proposition 1 cannot be viewed in isolation, but must be seen as the latest embodiment of a virulent racial prejudice which has infected California public and private life continuously since before the Civil War.

Second, *amici* urge that there is only one alternative to reversal of the Court of Appeal's ruling on the constitutionality of Proposition 1: a remand for additional fact-finding on the purpose behind Proposition 1. We think ample evidence exists to show that Proposition 1 is unconstitutional because it was adopted for the purpose of discriminating against minority students. However, the trial court never reached this issue, and the Court of Appeal erroneously sustained Proposition 1's constitutionality without ever giving petitioners a full and fair opportunity to develop factual evidence critical to the issue.

Third, *amici* will demonstrate that Proposition 1 limits remedies which may be necessary to vindicate *federal* constitutional rights in cases of school segregation which violates the fourteenth amendment. It does this by linking state court jurisdiction rigidly to federal court jurisdiction, even though the lower federal courts can have their jurisdiction curtailed in certain instances by Congress pursuant to article III of the Constitution. This "linkage" is a dangerous and unconstitutional encroachment on the fundamental principle of due process that state courts of general jurisdiction may not have their jurisdiction narrowed if the consequence is the denial of any meaningful remedy for the vindication of a federal right.

Finally, *amici* submit that the Court of Appeal improperly decided the question whether the Los Angeles public school system is segregated in violation of the fourteenth amendment. In 1970, the trial court gave focused attention to this issue and concluded that the segregation of the Los Angeles public schools was *de jure*. This finding was accepted by the California Supreme Court in 1976. Nevertheless, the court below declared that the law had changed since that time and, relying upon its reading of subsidiary factfinding by the trial court in 1970, it overruled the earlier holdings. If the Court of Appeal felt it necessary to reopen the question of *de jure* segregation in Los Angeles, it should at the least have examined the record rather than merely reviewed the 1970 findings. Because the court below incorrectly reached out to decide the issue, an appropriate course for this Court to follow is to remand for additional fact-finding and the application of current fourteenth amendment legal standards to an updated record.

ARGUMENT

I. PROPOSITION 1 MUST BE JUDGED IN THE HISTORICAL CONTEXT OF LONGSTANDING OFFICIAL SUPPORT FOR SEGREGATION AND DISCRIMINATION IN CALIFORNIA, WHICH REINFORCES THE OTHER EVIDENCE SHOWING THAT ITS PASSAGE WAS MOTIVATED BY RACIAL *ANIMUS* AND AN INTENT TO DISCRIMINATE

It has long been this Court's view that in cases challenging state legislation or official action as racially discriminatory, the historical context is an important evidentiary factor to be weighed. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977); *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967), and cases cited therein. The historical context of Proposition 1 compels the conclusion that its passage was intended to, and did, accomplish the racially motivated purpose of returning minority children in Los Angeles and throughout the State of California to segregated schools, just as a similar historical context caused this Court in *Reitman* to strike down another California voter initiative, Proposition 14. Although the Court of Appeal failed to take this background into account in assessing the validity of Proposition 1 (*see* Argument II *infra*), much of its outline is established by materials subject to judicial notice.

Amici agree fully with the petitioners that evaluation of the other factors specified by this Court's decision in *Arlington Heights*, 429 U.S. at 266-68, leads to the inevitable judgment that Proposition 1 intentionally discriminates against minority students in California. In this section of our brief, we assemble, for the Court's additional consideration, significant indicia of the historical context surrounding Proposition 1.

The historical record demonstrates a longstanding, unwavering pattern of governmental support for—or out-

right compulsion of—racial segregation and discrimination in every area, including public education. To the extent that the actions of the California Legislature, courts, or Department of Education began to reflect any different attitude, the voters of the state have consistently sought to return to a prosegregation, racially discriminatory public policy. For example, this Court noted in *Reitman*, 387 U.S. at 374, that the historical background of Proposition 14 included a 1961 legislative measure that outlawed racially restrictive covenants. That legislative measure was significant because California citizens had long used such covenants to segregate racial minorities, and California courts had consistently enforced them. *See Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596 (1919). When California voters rose up to undo this legislative progress by passing Proposition 14, the inference of racial motivation behind the initiative was compelling. Similarly, Proposition 1 represents but the latest in a series of attempts by the California electorate to overturn antidiscrimination steps taken by any branch of state government, and to preserve school segregation.

For the Court's convenience, we sketch the contours of the historical record in tabular form at the end of this section of the brief, at 8-11, *infra*, and summarize it here as follows:

Although California was not admitted to the Union as a slave state, within a few years its Legislature prohibited racially mixed schools, banned Negroes from testifying in judicial proceedings involving whites, and excluded blacks and Chinese individuals from public office. The state's official policy of racial separation and white supremacy continued unabated well into the twentieth century and was sensitive to every shift in popular prejudice. For example, legislation mandating separate schools was enacted in 1885 for Chinese children, in 1909 for Indian children, and in 1921 for Japanese children.

State officials enforced and encouraged white supremacist beliefs and the practice of racial segregation. In 1867, a year before California refused to ratify the fourteenth amendment, the Governor urged racial separation and specifically noted the operation of separate schools for "colored" children in the State. As indicated above, the California courts consistently enforced racially restrictive covenants by which housing patterns were kept segregated. By the 1930's California school district officials had developed techniques for maintaining segregated schools by selecting sites deep in racially homogeneous neighborhoods, and in 1953 the California Attorney General's Office frankly informed this Court that school district attendance zone boundaries were often gerrymandered for racial reasons. Despite early enactment of a civil rights measure, public accommodations remained largely segregated until the relatively recent past.

Efforts by the California Legislature and courts in the 1960's and 1970's to alter the state's traditional public policy to achieve greater equality of opportunity in the sensitive areas of housing and education were greeted with resistance and defiance. As noted above, Proposition 14 attempted to nullify statutory fair housing measures, and both the California Supreme Court and this Court found the initiative invidiously discriminatory and unconstitutional in *Reitman*. A subsequent legislative measure and a separate initiative, both designed to prevent school integration, were declared unconstitutional by the California Supreme Court, in one instance, and construed to avoid a declaration of unconstitutionality, in the other. Finally, the intentions of Proposition 1's supporters are illuminated by the action of its sponsor, *after its passage*, in initiating legislation (vetoed by the Governor) which would have instructed California courts applying federal decisional law under Proposition 1 to ignore this Court's constitutional holdings in *Columbus Board of Education v. Penick*, 443 U.S.

449 (1979) and *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979), because they were viewed as too favorable to school desegregation.

In sum, the historical context of Proposition 1 places the measure squarely within a long tradition of state policies to further racial separation and discrimination. Like the other evidence discussed by the petitioners, it points to the conclusion that Proposition 1 is invidiously discriminatory. The Court below erred in sustaining its constitutionality and applying it to this case.

Historical Overview of Discrimination in California

1849	California admitted to the Union.
	First California Constitution limits suffrage and legislative office to white males.[3]
1850	First California Legislature passes anti-miscegenation statute.[4]
	First California Legislature enacts measures to prohibit giving of testimony by non-whites (defined as those having 1/8 or more non-white blood) in judicial cases involving whites.[5]
1854	Separate schools for black pupils established in Sacramento and San Francisco; state law provides for school census only of white children and apportionment of state school funds based upon census only of white children.[6]
1863	California Legislature enacts law requiring the creation of separate schools for non-white pupils by local districts.[7]

[3] CAL. CONST., art. II, § 106; art. IV, § 116 (1849).

[4] 1850 Cal. Stats., ch. 140, at 424.

[5] 1850 Cal. Stats., ch. 99, § 14, at 230; ch. 142, § 306, at 455.

[6] B. REAMS & P. WILSON, SEGREGATION AND THE FOURTEENTH AMENDMENT IN THE STATES: A SURVEY OF STATE SEGREGATION LAWS 1865-1953; PREPARED FOR UNITED STATES SUPREME COURT IN RE: BROWN VS. BOARD OF EDUCATION OF TOPEKA 40-41 (1975) [hereinafter cited as REAMS & WILSON].

[7] Act of April 6, 1863, Cal. Stats., ch. 159, § 68, at 210. *See also* Act of March 22, 1864, 1863-64 Cal. Stats., ch. 209, § 13, at 213; Act of March 24, 1866, 1865-66 Cal. Stats. ch. 342, §§ 57-59, at 398; Act of April 4, 1870, 1867-70 Cal. Stats., ch. 556, § 56, at 838-39; CAL. POL. CODE §§ 1662, 1669 (1872).

1865, 1867	California Governor, in address to Legislature, notes existence of separate schools for non-white children in State.[8]
1868	California Legislature refuses to ratify fourteenth amendment.
1874	Segregation of black students upheld by California Supreme Court.[9]
1880	California Legislature repeals statutes requiring school segregation.[10]
1885	California Supreme Court orders admission of Chinese student to white school in San Francisco.[11]
	California Legislature, in reaction to decision, reenacts school segregation statute to apply to "Mongolian and Chinese" students, preventing admission of child.[12]
1886	Supreme Court of United States rules that San Francisco authorities discriminated against Chinese in administration of laundry ordinance.[13]
1902	Segregation of Chinese students upheld in federal court.[14]
1909	California Legislature amends Education Code to authorize separate schools for Indian students.[15]
1919	California Supreme Court enforces racially restrictive covenants.[16]
1921	California Legislature amends Education Code to require separate schools for Japanese Children.[17]

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[8] REAMS & WILSON at 34; 1867-68 CAL. STATE JOURNAL 32.

[9] Ward v. Flood, 48 Cal. 36 (1874).

[10] Act of April 7, 1880, 1880 Cal. Stat. Amend., at 47.

[11] Tape v. Hurley, 66 Cal. 473, 6 P. 129 (1885).

[12] REAMS & WILSON, at 42-43; Wysinger v. Crookshank, 82 Cal. 588, 23 P. 54 (1890).

[13] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[14] Wong Him v. Callahan, 119 F. 38 (C.C.N.D. Cal. 1902).

[15] REAMS & WILSON, at 42-43; *see* Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924).

[16] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596 (1919).

[17] REAMS & WILSON, at 42-43.

1925	California Supreme Court upholds separate school requirement for Indian pupils.[18]
1933	Los Angeles school district segregates Mexican-American children by site selection and school construction policies.[19]
1934-70	Pasadena school district officials use numerous devices to maintain racial segregation in the schools.[20]
1936-40, 1960-70	School construction, attendance zoning, racial assignment and within-school segregation used by Oxnard School District officials to isolate Mexican-American pupils.[21]
1942	Widespread racial and ethnic segregation found by Los Angeles sheriff to affect public life.[22]
1947	Los Angeles County Counsel defends anti-miscegenation law on grounds that "Negroes are socially inferior and have so been judicially recognized." [23]

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[18] Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924). The Court held that state school authorities were responsible for providing a "separate but equal" education for Indian students even in districts in which Indian children could attend federal institutions.

[19] A Los Angeles district official reported:

> [O]ur educational theory does not make any racial distinction between Mexican and native white population. However, pressure from white residents of certain sections forced a modification of this principle to the extent that certain neighborhood schools have been forced to absorb the majority of Mexican pupils of the district.

Reynolds, *The Education of Spanish Speaking Children in Five Southwestern States*, 1933 U.S. OFFICE OF EDUCATION BULLETIN No. 11, *quoted in* C. WOLLENBERG, ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975 112 (1976).

[20] Spangler v. Pasadena City School Dist., 311 F. Supp. 501 (C.D. Cal. 1970).

[21] Soria v. Oxnard School Dist. Bd. of Trustees, 386 F. Supp. 539 (C.D. Cal. 1974).

[22] 1942 report of Los Angeles County Sheriff noting segregation and exclusion in "swimming plunges, public parks and even in schools" as well as theaters and restaurants, *quoted in* I. HENDRICK, THE EDUCATION OF NON-WHITES IN CALIFORNIA 1849-1970 99 n.5 (1977).

[23] Perez v. Sharp, 32 Cal. 2d 711, 727, 198 P.2d 17, 26-27 (1947).

1953	California Attorney General advises Supreme Court of the United States that racial segregation of students is practiced by some school districts in State.[24]
1957	Survey finds widespread segregation in public accommodations despite state civil rights law.[25]
1959-69	School construction and gerrymandering of attendance zone boundaries used to segregate schools in Richmond school district.[26]
1964	Voters adopt Proposition 14 for purpose of repealing fair housing laws and protecting right of landlords to discriminate on grounds of race.[27]
1970	California Legislature adopts Wakefield amendment to Education Code for purpose of prohibiting use of transportation for school integration; later construed as ineffective so as to avoid constitutional question.[28]
1972	Voters adopt Proposition 21 to rescind State Education Department policy favoring elimination of racial imbalance and to prevent assignment on racial basis to overcome segregation; held unconstitutional.[29]
1979	Following passage of Proposition 1 by California voters, Legislature passes measure to limit incorporation of federal standards deemed too favorable to litigants seeking desegregation.[30]

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[24] REAMS & WILSON, at 47.

[25] ". . . 'after having a civil rights law for 50 years . . .' less than 20 percent of California's hotels and motels will accommodate Negroes," Chicago Defender, April 27, 1957, at 20.

[26] Johnson v. Richmond Unified School Dist., No. 112094 (Super. Ct., Contra Costa County, April 3, 1972).

[27] Reitman v. Mulkey, 387 U.S. 369 (1967).

[28] San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309, *cert. denied sub nom.* Fehlhaber v. San Francisco Unified School Dist., 401 U.S. 1012 (1971).

[29] Santa Barbara School Dist. v. Superior Ct., 13 Cal. 3d 315, 530 P.2d 605, 18 Cal. Rptr. 637 (1975).

[30] *See* Comment, *Proposition 1 and Federal Protection of State Constitutional Rights*, 75 NW. U.L. REV. 685, 704-05 n.120 (1980); Note, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 GOLDEN GATE U.L. REV. 611, 666 n.251 (1980).

II. WHILE THERE IS ENOUGH EVIDENCE IN THE EXISTING RECORD TO SHOW PROPOSITION 1 IS UNCONSTITUTIONAL, THERE IS NOT ENOUGH EVIDENCE TO SUSTAIN ITS CONSTITUTIONALITY

In the first section of this brief we outlined how Proposition 1 grew out of California's long history of racial and ethnic discrimination. The immediate history of Proposition 1 reveals that it is intended to deprive state courts of the means to aid minority children who seek to enforce their right to attend desegregated schools. We believe that the facts in this case, illuminated by the history of Proposition 1, compel the conclusion that Proposition 1 is unconstitutional. If this Court is disposed to give consideration to the possible validity of the initiative, however, it should do so only after remanding the case for further factual development in the trial court.

In determining the validity of a measure like Proposition 1, which purports to be racially neutral, the Court must inquire not merely whether it denies minority students the equal protection of the laws by its express terms, but also whether this protection is denied "in substance and effect." Without such an inquiry, "a review by this Court would fail in safeguarding constitutional rights." *Norris v. Alabama*, 294 U.S. 587, 589-90 (1935) (Hughes, C.J.). The Court cannot make this essential inquiry, however, unless all parties have had an opportunity to present relevant evidence, and the Court has before it a complete record developed in the trial court. Important and difficult constitutional issues cannot and should not be decided in the absence of an adequate factual record. *Time, Inc. v. Firestone*, 424 U.S. 448, 461-63 (1976); *W.E.B. DuBois Clubs v. Clark*, 389 U.S. 309, 312 (1967).

In this case, the factual record necessary to support the decision of the Court of Appeal is entirely lacking. The trial court did not reach the issue of the constitu-

tionality of Proposition 1 and rested its decision for plaintiff on other grounds. Accordingly, the subsequent decision of the Court of Appeal that Proposition 1 is constitutional is entirely unsupported by any findings of fact with respect to the history of Proposition 1, its objectives, or its impact on the plaintiffs in this case. Rather, the Court of Appeal validated Proposition 1 by relying on the brief and self-serving statement of legislative purpose appended to the measure, by indulging the negative presumption that the legislators who wrote and the voters who adopted Proposition 1 "could have been motivated without segregative intent and discriminatory purpose," and by characterizing arguments to the contrary as "pure speculation," even though petitioners had never had their full day in court on the issue of intent. 113 Cal. App. 3d at 654-55, 170 Cal. Rptr. at 509.

This Court should not permit this unsupported decision to stand. Instead it should remand the case for an examination of these essential questions in the trial court. If the Court does not do this, not just these petitioners, but all minority children attending illegally segregated schools in California will have had their right to an effective remedy decided without an opportunity for meaningful judicial review.

The decisions of this Court in *Washington v. Davis*, 426 U.S. 229, 239 (1976), *Arlington Heights, supra*, and *Personnel Administrator v. Feeney*, 432 U.S. 256 (1979), establish that in considering the validity of a purportedly neutral state constitutional amendment, like Proposition 1, an evaluation of all circumstantial and direct evidence of purpose is essential. The starting point for this inquiry is "the impact of the official action—whether it bears more heavily on one race than another." Sometimes impact alone may present so stark a picture of racial discrimination that no further inquiry is necessary. If impact alone is not clearly determinative of intent, however, the court must go on to examine other evidence, including evidence of the immediate and long-range procedural and substan-

tive history of the challenged action. *Arlington Heights*, 429 U.S. at 266-268.

A. The Constitutionality of Proposition 1 Cannot be Upheld Without an Examination of Its Impact on Minority Students

In its haste to affirm the constitutionality of Proposition 1, the Court of Appeal failed to take even the first step in this essential analysis of purpose. The Court of Appeal refused to make any meaningful evaluation of the effect of Proposition 1 on minority children. Instead, that court simply looked at the text of Proposition 1, and blithely concluded that "all the amendment does is remove from the court the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation." *Crawford v. Board of Education* (*"Crawford II"*), 113 Cal. App. 3d at 655-656, 170 Cal. Rptr. at 510. The court made no attempt to evaluate which of those "scores of remedies" could be effectively applied to existing conditions in the Los Angeles Unified School District or, indeed, to identify even one such remaining "remedy." In fact, the Court of Appeal made no determination as to whether Proposition 1 would leave the state courts with *any* effective means to alleviate segregation.

The California Supreme Court in *Crawford v. Board of Education* (*"Crawford I"*) identified the basic tools for accomplishing desegregation—redrawing neighborhood attendance zones, "pairing" or "clustering" of schools, establishment of "magnet schools" and implementation of "satellite zoning." *Crawford I*, 17 Cal. 3d 280, 305, 551 P.2d 28, 44, 130 Cal. Rptr. 724, 740 (1976). Every one of these techniques requires pupil assignment or pupil transportation. Indeed, effective desegregation of necessity almost always requires some form of pupil assignment or pupil transportation. It is the role of the school board in mandating school assignment and transportation that forms the predicate for its obligation to desegregate its schools,

and makes judicial review of its performance of that obligation so essential.

Although the trial court did not reach the issue, the record in this case illustrates how Proposition 1 will prevent California courts from ordering any effective remedy for segregation. The Los Angeles School Board refused even to provide transportation for voluntary transfers until ordered to do so by the trial court. (1970 *Findings*, ¶ IV.48).[31] The court-ordered desegregation plan which led to this appeal included a mix of the techniques indentified by the California Supreme Court, including "pairing," "cluster schools," "magnet schools," and the continuation of voluntary transfers with transportation. The plan also required the assignment of non-English-speaking Hispanic pupils in groupings which would facilitate bilingual education and ended the practice of assigning non-English-speaking Hispanic students to programs for lower-achieving students. This entire plan would be prohibited by Proposition 1. (Order After Trial Upon Plan II and the Proposed All-Voluntary Program).

Indeed, all the evidence of impact available in the record suggests petitioners will be denied any remedy at all if Proposition 1 is upheld. In 1970 the trial court concluded that the Los Angeles school board would not desegregate its schools unless compelled to do so. (1970 *Findings*, ¶ IV.47, IV.54, IV.55). Ten years later that court found that the Los Angeles Board still "did not have a course of action designed to make meaningful progress in

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[31] As noted by this Court, "Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensible remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. *In order to be effective, such a transfer arrangement must grant the transferring student free transportation* and space must be made available in the school to which he desires to move." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 26-27 (1971). (emphasis added.)

the elimination of harms arising out of minority segregated schools and that [even then] the Board had not . . . resolved itself to achieve any such plan." (Opinion, Findings of Fact and Conclusions of Law after Hearing Re: Sufficiency of the Response by Respondent to the Existing Writ of Mandate and to the Order Issued Previously [hereinafter, "July 7 Order"] at 3). Moreover, the court specifically concluded that the "all voluntary" program the board proposed to implement, if permitted to do so by the court, would not desegregate *any* minority schools and reflected a lack of concern for minority students. (July 7 Order, at 4-5.)

This, with other evidence that can be adduced on remand, will establish that the legislators who proposed and the voters who adopted Proposition 1 knew and intended that it would do more than just regulate one "remedy"—it would effectively destroy any meaningful chance for the minority children in Los Angeles to challenge the school system in which they have been segregated in overcrowded schools with inferior teachers, curriculum, and physical facilities. *Crawford II*, 113 Cal. App. 3d at 643, 170 Cal. Rptr. at 501. This sort of predicted and planned disparate impact on minorities is central to assessing the constitutionality of Proposition 1, and it may be considered only if the action is remanded for that purpose.

B. The Constitutionality of Proposition 1 Cannot be Upheld Without an Examination of Its Historical Background

Even a superficial review of the history of Proposition 1 contained in the existing record, made in light of the standards established in *Reitman*, discloses sufficient indicia of discriminatory purpose to demonstrate that further examination of this history is essential before reaching any final determination that Proposition 1 does not deny minority students their federally guaranteed right to the equal protection of the laws.

This action was initiated in 1963. In 1970, the trial court first ordered the desegregation of the Los Angeles

school system. (July 7 Order, at 6-14.) That same year, legislation requiring parental consent before a child could be bused to school was added to the California Education Code.[32] In 1972, the Education Code was amended to forbid student assignment on the basis of race.[33] The California Supreme Court determined that neither statute could be constitutionally applied to prevent or impede desegregation. *San Francisco Unified School District v. Johnson*, 3 Cal. 3d 937, 479 P.2d 669, 92 Cal. Rptr. 309, *cert. denied sub nom. Fehlhaber v. San Francisco Unified School District*, 401 U.S. 1012 (1971); *Santa Barbara School District v. Superior Court*, 13 Cal. 3d 315, 530 P.2d 605, 18 Cal. Rptr. 637 (1975).

In the meantime, the Los Angeles Board exercised every means it had to resist the order to desegregate. Indeed, the first mandatory desegregation plan was not implemented until 1978. Only a year later, when Proposition 1 was passed, the Board immediately sought to utilize the constitutional amendment to abandon any meaningful desegregation. (July 7 Order, at 6-14, 96-96).

These facts form the outline. A full evaluation of the facts on remand would establish that Proposition 1 is the culmination of a twenty-year campaign by the Board of Education and its political allies throughout the state to evade its statutory and constitutional obligation to provide desegregated education in California and to insulate this gross breach of duty from meaningful judicial review. *See* Comment, *Proposition 1 and Federal Protection of State Constitutional Rights*, 75 Nw. U.L. Rev. 685, 690-693 (1980); Note, *California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection Clause*, 10 Golden Gate U.L. Rev. 611, 669-681 (1980).

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[32] CAL. EDUC. CODE § 1009.5 (1970) (currently CAL. EDUC. CODE § 35350 (1978) (West)).

[33] CAL. EDUC. CODE § 1009.6 (1972) (currently CAL. EDUC. CODE § 35351 (1978) (West)).

We believe that the sensitive evaluation of the evidence mandated by this Court in *Arlington Heights* would demonstrate that the true purpose of Proposition 1 was to assist recalcitrant school boards in California, like the Los Angeles school board here, to evade their obligations to minority students and to maintain and perpetuate racial and ethnic separation in the schools free from unwelcome judicial review. The available history, at the very least, establishes a sufficient likelihood that Proposition 1 was enacted with this discriminatory intent to preclude any conclusion that it is constitutional on its face. It is therefore essential for this Court to remand this case for an examination in the trial court of the impact, and the objectives, of Proposition 1 in light of its historical context and the conditions existing prior to its enactment.

III. PROPOSITION 1 IS UNCONSTITUTIONAL BECAUSE IT DENIES THE POWER OF STATE COURTS OF GENERAL JURISDICTION TO GIVE REMEDIES WHICH ARE NECESSARY TO REDRESS CERTAIN FOURTEENTH AMENDMENT VIOLATIONS, IN CASES WHERE CONGRESS MAY ATTEMPT TO CURTAIL LOWER FEDERAL COURT JURISDICTION

For the reasons set forth below, *amici* submit that a state may not restrict the remedies which its courts may provide in suits involving federal constitutional violations.[34] This principle applies not only when the limitations on remedy are imposed directly, but also when the authority of state courts is circumscribed by making them subject to the same restraints as are the lower federal courts. Proposition 1 has precisely this prohibited effect. As a matter of fundamental California law, subject to alteration only through the tortuous process of constitutional

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[34] Such findings have been made by trial courts in this and other California school segregation actions. *E.g.*, Crawford v. Board of Educ., 17 Cal. 3d 280, 288-289, 551 P.2d 28, 32-33, 130 Cal. Rptr. 724, 728-729 (1976); Johnson v. Richmond Unified School Dist., No. 112094 (Super. Ct., Contra Costa County, April 3, 1972).

amendment, it reduces the authority of state courts in all school segregation action *pro tanto* with the authority of the lower federal courts. The availability of a remedy to effectuate the right to a non-segregated education thus will vary both with shifts in federal decisional law, and also with any legitimate exercise of Congress' authority to regulate the jurdisdiction of—or even to eliminate entirely—the lower federal courts. Even more significant, the availability of necessary remedies in fourteenth amendment school desegregation suits in California courts will be called into question while the federal constitutionality of subject-specific jurisdictional limitation measures is litigated. *See, e.g.*, Sager, *The Supreme Court, 1980 Term —Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) (hereinafter, "Sager"); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 Harv. C.R.—C.L. L. Rev. 129 (1981) (hereinafter, "Tribe").

A. As Courts of General Jurisdiction, State Courts May Not Be Limited in Their Ability to Impose Necessary Remedies for Federal Constitutional Violations

It was part of the plan of the Constitution that state courts of general jurisdiction would act as the final line of defense against unconstitutional government—both state and federal—in cases where the lower federal courts had not been given jurisdiction by Congress, or where their limited subject matter jurisdiction had been narrowed by permissible congressional regulation. *See* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 11-12 (2d ed. 1973); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 53 (1923). Proposition 1 rigidly ties the power of state courts to give constitutionally necessary remedies to the power of federal courts to do so: a linkage that may seem innocuous until it is evaluated in the context of (a) the constitutional grant of some

measure of control over federal court jurisdiction to Congress,[35] and (b) the current interest on the part of some members of Congress to use that control to limit the remedies which federal courts may award in suits to enforce constitutional rights,[36] including remedies necessary to eliminate unconstitutional dual school systems. Of course, there are limits on Congress' powers to restrict federal court jurisdiction, for those powers must be exercised in harmony with other provisions of the Constitution. Sager, *supra* at 37-42. The same limits apply to restrictions on state court jurisdiction to adjudicate and redress claims of federal constitutional right, in light of the supremacy clause and the fundamental role of state courts in the constitutional scheme.

For instance, Congress may not withdraw jurisdiction from a federal court in a way that infringes the legitimate constitutional powers of the Executive Branch of government, or requires a federal court to find facts which are untrue to be true. *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). Another principle that neither Congress nor the states can violate in the guise of regulating jurisdiction is that for every violation of the federal Constitution *some* court must have jurisdiction to give those remedies which are necessary to redress the wrong. *See, e.g., Guam v. Olsen*, 431 U.S. 195, 204 (1977); *Johnson v. Robison*, 415 U.S. 361, 366 (1974); *Yakus v. United States*, 321 U.S. 414, 444 (1944); *see also* Sager, *supra*, at 41 n.70, 75-76 & n.183. Professor Hart put the matter succinctly when he wrote:

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[35] Article III, § 1 states, in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *See* Palmore v. United States, 411 U.S. 389, 400-01 (1973); Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850); C. WRIGHT, THE LAW OF FEDERAL COURTS § 10, at 29 (3d ed. 1976). The proposition that the lower federal courts could today be eliminated or severely restricted in their authority has been questioned. *See, e.g.*, Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974).

[36] See discussion *infra* at 24-25 and n.39.

"a necessary postulate of constitutional government [is] that a court must always be available to pass on claims of constitutional right to judicial process, and to provide such process if the claim is sustained." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1372 (1953).

This postulate binds state legislators and other state law-making authorities no less than Congress. The states may not restrict the jurisdiction of their own courts to give remedies which are required to vindicate federal rights. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-39 (1969) (state court must grant injunctions appropriate to the enforcement of federal civil rights "if that court is empowered to grant injunctive relief generally"); *Testa v. Katt*, 330 U.S. 386 (1947) (supremacy clause requires state court to assume jurisdiction over a suit brought under federal price control legislation). This is especially true when the jurisdiction of federal courts has been curtailed by Congress or by the unique limits on the federal judicial power contained in the Constitution. *See, e.g., General Oil Co. v. Crain*, 209 U.S. 211, 226 (1908) (disregarding as unconstitutional a state statute making state officers immune from suit in state courts where it is assumed that "suit against state officers is precluded in the national courts by the Eleventh Amendment"); *cf. Maine v. Thiboutot*, 448 U.S. 1, 11 & n.12 (1980) (supremacy clause requires state courts to give attorneys' fees award in civil rights action which was beyond the jurisdiction of a federal district court).

Indeed, the powers which Congress does have to control the jurisdiction of federal courts, and the remedies they may give, can be justified, if at all, only by the mandatory availability of *state* courts to give those same remedies where indispensable to the vindication of federal rights. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1976), for instance, withdraws the jurisdiction of federal courts to issue injunctive remedies in "a case

involving or growing out of a labor dispute." In *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938), the Court sustained the constitutionality of the Norris-LaGuardia Act, based upon Congress' broad authority to regulate federal court jurisdiction. However, the Court did so in light of and without limiting the force of its earlier holding in *Truax v. Corrigan*, 257 U.S. 312 (1921), that the due process and equal protection clauses of the fourteenth amendment prohibited similar state legislation restricting the jurisdiction of state courts to give injunctions in certain labor disputes. *See also* H.R. Rep. No. 669, 72d Cong., 1st Sess. 10 (1932). As the *Truax* Court observed, "[i]t is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law." 257 U.S. at 334. Whatever the merits of a plaintiff's claim to injunctive relief in a labor dispute may be, *Truax* establishes that at the very least a state court must stand ready to entertain his application for it, give him a fair hearing, and grant the remedy where appropriate.

Anything less means that for some constitutional violations by state and federal governments, the victim may not obtain any judicial review and relief: a proposition abhorrent to any legal system dedicated to the rule of law. *See Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U.S. 887 (1948). That federal courts may be powerless to act in such a case reinforces rather than detracts from the duty of state courts to assume jurisdiction. *See Maine v. Thiboutot*, 448 U.S. at 11 n.12.

B. In Violation of Due Process of Law, Proposition 1 Unconstitutionally Links State Court Jurisdiction to Give Necessary Remedies to Limits on Federal Court Jurisdiction

Proposition 1 states, in pertinent part, that "pupil school assignment" and "pupil transportation" remedies may not be used by California state courts:

> (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, *and* (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th amendment of the United States Constitution. (emphasis added.)

This provision has been construed by the state courts to make their jurisdiction in fourteenth amendment cases turn on what a federal court could do in a similar case. For instance, Judge Cohn of the San Mateo County Superior Court has observed:

> Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of federal courts there is somehow a violation of [the] federal constitution.

Tinsley v. Palo Alto Unified School District, No. 206010 (July 10, 1980), quoted in *Board of Education v. Superior Court*, 448 U.S. 1343, 1345 (1980) (Rehnquist, Circuit Justice). Likewise, the Court of Appeal in this case characterized the effect of Proposition 1 as follows:

> The effect of the amendment was to prohibit state courts, *in desegregation cases*, from ordering school boards to mandatorily reassign and transport pupils on the basis of race, except to remedy a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution under circumstances which would authorize a federal court under federal decisional law to issue such an order.

113 Cal. App. 3d 633, 636-37, 170 Cal. Rptr. 495, 497-98 (emphasis added). As this passage shows, Proposition 1 concerns itself with all "desegregation cases," whether

they arise under the state or the federal constitutions. On its face, the measure restricts the power of California state courts in all such cases to issue only those constitutional remedies which "a federal court would be permitted under federal decisional law to impose."

This Court's decisions establish squarely that "pupil transportation" and "pupil school assignment" remedies may be necessary, and hence mandatory, to remedy certain fourteenth amendment violations. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *cf. Wright v. Council of City of Emporia*, 407 U.S. 451 (1972). Indeed, in this very case the trial court determined that a comprehensive structural remedy embodying these features was necessary on the facts to remedy *de jure* segregation of the Los Angeles public school system.[37] Yet Proposition 1 might, if given effect by this Court, eliminate the right of access of minority litigants to such potentially essential remedies in state courts, even though Congress had tried to strip lower federal courts of their jurisdiction to give comparable remedies. At the very least, under Proposition 1, school segregation litigation in the California courts would be disrupted by any congressional effort to restrict the "busing" orders of the federal courts, whether those efforts were ultimately determined to be constitutional or not.

The threat of Congress attempting to withdraw federal court jurisdiction to issue such remedies is very real. In the past decade, numerous legislative proposals have been made to curb the power of federal courts to use busing as a remedy in school desegregation cases. *See e.g.*, G. Gunther, *Cases and Materials on Constitutional Law* 730-32 (9th ed. 1975); Goldberg, *The Administration's Anti-Busing Proposals—Politics Makes Bad Law*, 67 NW. U.L. REV. 319 (1972); Rotunda, *Congres-*

[37] This factual conclusion was erroneously tossed aside by the Court of Appeal, as we make clear in the last section of this brief.

sional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing, 64 Geo. L.J. 839 (1976). At least three such proposals—S. 1647, S. 1743 and S. 1760—are indeed pending in the current session of Congress, and at least one of these, the Hatch Bill, S. 1760, has been reported out of subcommittee to the full Senate Judiciary Committee.

All of these measures purport to rest upon Congress' concededly broad power to regulate federal court jurisdiction under article III of the Constitution. *But see* Sager, *supra*, at 77-78 n. 187, 87; Tribe, *supra*. Whatever the precise scope of that power, it clearly does not authorize either Congress or the states to deny the jurisdiction of *state* courts to grant constitutionally necessary remedies, as Proposition 1 appears to do if followed to its logical conclusion.

This Court cannot sanction such a result if it is to be faithful to the constitutional principle that *some* court, *state or federal*, must always stand ready to bring recalcitrant government into line with the commands of the Constitution.[38] Professor Hart correctly identified what was at stake in a case such as this when he answered the question of where a litigant can go to get a remedy for a constitutional violation if Congress has shut off access to the lower federal courts:

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[38] Although limitations on the power of the lower federal courts to effectuate adequate remedies in school desegregation cases have not yet been enacted (and although the validity of such measures has not yet been determined), Proposition 1 is unconstitutional. Whatever the breadth of Congress' authority to determine how the fourteenth amendment shall be enforced, *see* Katzenbach v. Morgan, 384 U.S. 641, 654-56 (1966), for the reasons given above, the *states* may not determine that vindication of fourteenth amendment rights shall be the exclusive preserve of the federal courts, and that state courts will meekly follow wherever federal courts are led by Congress. Proposition 1 therefore oversteps the limits of California's legislative authority as of its passage, whether or not objectionable restrictions upon federal court authority are operative, and the measure is unconstitutional on its face.

> The state courts. In the scheme of the Constitution, they are primary guarantors of constitutional rights, and in many cases they may be the ultimate ones. If they were to fail, and if Congress had taken away the Supreme Court's appellate jurisdiction and been upheld in doing so, then we really would be sunk.

Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, *supra*, 66 Harv. L. Rev. at 1401.

This Court should hold that Proposition 1 is an unconstitutional attempt by the law-making authorities of California to restrict the access of civil rights litigants to remedies in state courts to redress federal constitutional violations.[39]

IV. IN DECIDING THAT THE SEGREGATION IN THE LOS ANGELES PUBLIC SCHOOL SYSTEM DOES NOT VIOLATE THE FOURTEENTH AMENDMENT AS A MATTER OF LAW, THE COURT OF APPEAL ERRONEOUSLY REVERSED THE TRIAL COURT WHEN IT OUGHT TO HAVE OPENED THE RECORD FOR FURTHER FACTUAL INQUIRY

The history of this case is one of monumental effort in the trial court. The original trial in the action lasted for 65 days, involved the introduction of voluminous evidentiary material; and resulted in a reporter's transcript running to 62 volumes. *Crawford I*, 17 Cal. 3d at 287, 551 P.2d at 31, 130 Cal. Rptr. at 727. After the resulting mandate for desegregation of the Los Angeles schools

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[39] There are now pending in the 97th Congress numerous other proposals designed to restrict lower federal court, and Supreme Court, jurisdiction in certain subject matter areas. *E.g.*, S. 158 (abortion); S. 481 (school prayer); H.R. 865 (school prayer); H.R. 867 (abortion); H.R. 72 (school prayer). If the Court upholds Proposition 1 in this case, it is easy to see how state legislators and electorates might try to avoid any judicial review at all in these controversial areas by "tying" state court jurisdiction to federal court jurisdiction.

was affirmed by the California Supreme Court, in an opinion which specifically accepted the lower court's finding of *de jure* segregation,[40] the trial court spent an additional three years monitoring the school board's compliance with the mandate. In the course of that oversight, the Court received over 420 written exhibits, conducted 170 days of hearing and examined the testimony presenting the Board's case on the results of its prior plans, the reports of its own referee, the court-appointed monitoring committee, and the reports of the court-appointed experts (July 7, 1980 order, at 2-3). The trial court then reaffirmed its original conclusion that there was *de jure* segregation in the Los Angeles Unified School District in violation of the fourteenth amendment. Accordingly, the trial court concluded that reexamination of the mandate for desegregation in light of the enactment of Proposition 1 was unnecessary, and it ordered the Board to proceed with desegregation.

The Court of Appeal reversed. In doing so, that court confined its attention to the 1970 findings of the trial court and determined that these findings had been made without the benefit of later opinions of this Court establishing that the essence of unconstitutional, or "*de jure*," segregation is "the purpose or intent to segregate." At that point, the Court of Appeal should have remanded the case to afford the trial court "an opportunity to reexamine the record on the issue of intent" and to "permit the parties to offer such additional evidence as they may desire pertaining to that issue." *Johnson v. San Francisco Unified School District*, 500 F.2d 349, 352 (9th Cir. 1974). Instead, based solely on its review of the findings of the 1970 trial court, and without purporting to make any independent evaluation of the evidence, the Court of Appeals made its own determination that the school segrega-

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[40] *Crawford I*, 17 Cal. 3d at 301, 551 P.2d at 41, 130 Cal. Rptr. at 737.

tion in Los Angeles was not the result of purposeful discrimination.[41]

This analysis has obvious flaws. The Court of Appeal improperly considered only the subsidiary factual findings of the trial court in reaching its conclusion that the segregation in the Los Angeles schools was not the result of purposeful discrimination. It should have examined the entire record of the trial—but that record was not even before it on the appeal below. This is particularly important since the trial court's 1970 judgment was based in part on the state law affirmative duty of the Los Angeles School Board to desegregate its schools. *See Crawford I*, 17 Cal. 3d at 284-285, 551 P.2d at 39 130 Cal. Rptr. at 726. The trial court's 1970 findings for this reason did not exhaustively catalogue the facts of record demonstrating that the segregated condition of the Los Angeles school district originated with "acts done with specific segregative intent and discriminatory purpose." *Cf. Columbus*, 443 U.S. at 466 n.14.[42]

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[41] To the extent that the decision below rejects the trial court's original findings, the action of the Court of Appeal was plainly in error. A reviewing court cannot overturn the findings of fact of the trial court without examination "of the entire evidence." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Even if the Court of Appeal made such an examination, however, it would still be barred from substituting its own inferences for those made by the trial court. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). This analysis is not altered by the fact that the decision below was made in the California Court of Appeal. The standard in the California Courts, is, if anything, more stringent. Board of Educ. of Long Beach v. Jack M., 19 Cal. 3d 691, 697, 566 P.2d 602, 605, 139 Cal. Rptr. 700, 703 (1977).

[42] The trial court in this case limited its findings to the period after 1963 when this lawsuit was initiated. There was no consideration whether the segregation in 1963 was an outgrowth of a segregated "dual school system" prior to 1954. On remand, petitioners could establish that Los Angeles was indeed operating such a dual system. *See generally* I. HENDRICK, THE EDUCATION OF NON-WHITES IN CALIFORNIA, 1849-1970 91-104 (1977).

The Court of Appeal also erred in its facile assumption that the Los Angeles District's "maintenance of a neighborhood school system, siting schools in the geographic center of their need, assignment of pupils to neighborhood schools, and failure to provide free transportation for open tranfers" were "neutral acts." *Crawford II*, 113 Cal. App. 3d at 644, 170 Cal. Rptr. at 502. Any determination or decision that a "neighborhood school policy" is in fact neutral, and not a "potent weapon for creating or maintaining" racial segregation requires intensive factual scrutiny. *Swann*, 402 U.S. at 20-21; *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 201-02 (1973); *id.* at 234-35 (Powell, J., concurring). It may also be necessary to extend the court's inquiry to the relationship between school segregation and residential segregation since residential patterns themselves may be the product of an illegally segregated school system, or other unconstitutional state action. *Columbus*, 443 U.S. at 465 n.13; *Swann*, 402 U.S. at 20-21; *Keyes*, 413 U.S. at 201-202; *Crawford I*, 17 Cal. 3d at 299-300, 551 P.2d at 40, 130 Cal. Rptr. at 736-737.

As Justice Stewart has observed, the question whether actions which produce racial separation are intentional, within the meaning of the decisions of this Court, presents difficult and subtle issues of fact. *Columbus*, 443 U.S. at 470-71 (Stewart, J., concurring in the result).

This careful factual scrutiny required in evaluating a claim of constitutional right was not provided by the Court of Appeal's summary conclusion that the trial court erred, eleven years ago, in finding *de jure* segregation in Los Angeles. But that summary conclusion by the Court of Appeal was the predicate for its holding that Proposition 1 must be applied in this case, and, further, that it could be applied without violating petitioners' rights under the fourteenth amendment. Since this Court has granted *certiorari* to review that holding, the manner in which the court below decided the fundamental issue of federal con-

stitutional law on which the questions presented in this case rest must, of necessity, concern the Court. Amici suggest, therefore, that the Court may wish to remand the case without reaching the important constitutional questions presented by Proposition 1 in order to permit the *trial court* to make an initial determination as to the existence or non-existence of purposeful discrimination in the Los Angeles School District in accordance with the legal standards established by this Court.

CONCLUSION

For all of the foregoing reasons, the judgment of the California Court of Appeal should be reversed, and the case remanded for entry of judgment for petitioners. Alternatively, the judgment should be reversed and the case remanded for further fact-findings on the purpose and effect of Proposition 1, and on the existence of segregation in the Los Angeles public schools in violation of the fourteenth amendment.

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No. 81-38
IN THE SUPREME COURT
OR THE UNITED STATES

MARY ELLEN CRAWFORD, et al.,
Petitioner,
vs.
THE BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

BRIEF ON BEHALF OF THE LEAGUE OF WOMEN VOTERS OF CALIFORNIA

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Questions Presented for Review

Of the questions presented for review, the League of Women Voters of California elects to brief only one:

Whether a ballot initiative known as Proposition I, which explicitly classifies school desegregation matters adversely and differently from other racial matters and from other educational matters, is inconsistent with Hunter v. Erickson, 393 U.S. 385 (1969) and thus is unconstitutional under the equal protection clause of the Fourteenth Amendment.

INTRODUCTION

The League of Women Voters of California, with 12,000 members, has long been a supporter of school desegregation. The League was a signator of the ballot argument against Proposition I. It took an active and visible role in the campaign against the proposition. It has also participated as amicus curiae in litigation challenging the constitutionality of Proposition I.

ARGUMENT

I

PROPOSITION I IS INCONSISTENT WITH HUNTER v ERICKSON, 393 U.S. 385 (1969) AND IS EITHER UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OR OF NO EFFECT.

In Hunter v. Erickson (1969) 393 U.S. 385,89 S. CT. 557, the City of Akron passed a charter amendment requiring that any ordinance regulating the use, sale, etc. of real property on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors. This court held that the charter amendment 'drew a distinction between those

groups who sought the law's protection against racial, religious, or ancestral discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends' and also 'that the law's impact falls on the minority.' Therefore, it 'discriminates against minorities, and constitutes a real, substantial, and invidious denial of the equal protection of the laws.' Hunter v. Erickson, supra, 89 S.CT. 560,562.

Proposition I seeks to draw a distinction between those students who attend schools segregated by state action and those attending schools segregated by other causes, a distinction which is contrary to California law. The law's impact falls solely on minority students. Therefore, if Proposition I is so construed as to

carry out its purpose, it constitutes a real, substantial, and invidious denial of the equal protection clause of the Fourteenth Amendment.

Stated in other terms, Proposition I is unconstitutional if it prevents California courts from ordering the desegregation of California schools by all reasonably feasible means, regardless of the cause of the segregation.

A. In school desegregation cases the touchstone by which state action must be measured is the federal Equal Protection Clause, which states:

> '(A state may not) deny any person within its jurisdiction the equal protection of the laws.'

B. The laws of the State of California regarding school desegregation are clear:

1. Education is a fundamental right under California law. Serrano v. Priest (1971) 5 Cal. 3d 584, 604-610 [96 Cal.Rptr. 601]; Serrano v. Priest (1976) 18 Cal. 3d 728, 765 [135 Cal. Rptr. 345]; Crawford v. Board of Education (1976) 17 Cal. 3d 280, 297 [130 Cal. Rptr. 724]; Tinsley v.Palo Alto Unified School District(1979) 91 Cal. App. 3d 871, 906 [154 Cal. Rptr. 591].

2. California local school boards and the state have, and have had since at least 1963, a duty to alleviate or eliminate segregation in schools, regardless of the cause of the segregation, by reasonably feasible means. Jackson v. Pasadena City School District(1963) 59 Cal. 2d 876 [31 Cal. Rptr. 606]; Crawford, supra, 17 Cal. 3d 280, 291, 292; Tinsley, supra, 91 Cal. App. 3d 904-907.

3. Local school boards in California are agents of the state. Crawford, supra 17 Cal. 3d 295; Tinsley, supra, 91 Cal. App.3d 881, 882.

4. Any action by the state which obstructs the removal of de facto school segregation transforms the setting into one of de jure segregation. San Francisco Unified School District v. Johnson (1971) 3 Cal. 3d 937, 959 [92 Cal. Rptr. 309,323]

5. The action of the electorate in adopting a proposition is state action. Hunter v. Erickson, supra, 89 S.Ct. 392.

C. Since the duty to desegregate schools is directed solely to protecting the right of minority students to a desegregated education, any failure to carry out that duty can only impact

against minority students. The League does not here overlook the benefit to white students of an integrated education, but recognizes that constitutional protection in this instance is accorded only to minority students.

D. The clear purpose of Proposition I, and the purpose for which respondant school district seeks to use it, is to prevent a California court from ordering the desegregation of California schools when the segregation is caused by other than state action. See the arguments in the ballot pamphlet by the proponents of Proposition I, the analysis of the Legislative Analyst, letters published by the state Attorney General and Secretary of State prior to the election, and articles published in the press prior to the election.

E. The key proviso in Proposition I reads:

> 'provided that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceeds those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation.'

Granted that the purpose of this clause and related language in Proposition I is to prevent a California Court from ordering the desegregation of de facto segregated schools, we are faced with a logical impossibility. That is, if Proposition I is construed to permit the state to deny some minority students the equal protection of California laws, then California law will be applied in

a discriminatory way, and the proposition will violate the federal Equal Protection Clause. The only construction of Proposition I which does not violate the Fourteenth Amendment is that proposition I does not accomplish its intended purpose.

This dilemma is the one with which the state appellate court struggled. The court attempted to resolve the dilemma by holding that the duty to desegregate segregated schools, regardless of the cause of the segregation, still exists, but that the courts are now forbidden to use pupil school assignment or pupil transportation as remedies. Crawford, supra, 113 Cal. App. 3d 652, 653. This simply replaces one logical impossibility with another. If the duty to desegregate exists in California, then under both federal and

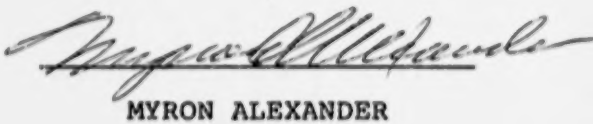
California law, the courts are entitled to use any of a broad panoply of remedies, including pupil school assignment and pupil transportation. Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S. 1, 91 S.Ct. 1267; Crawford (1976), supra, 17 Cal. 3d.308,309.

The appellate court's error appears to arise from the misapprehension that the federal duty is unrelated to the state duty. The federal duty is to carry out state laws without discrimination. If the state law itself is discriminatory on its face it violates the federal Equal Protection Clause. If the state law is not discriminatory on its face, it still may not be applied in a discriminatory way. The latter is our present situation. California law does not violate the Fourteenth Amendment.

It follows that California may not apply its law to deny some minority students a desegregated education. It would indeed be an anomaly if the Fourteenth Amendment could be used to transform a state-created duty from a non-discriminatory duty to a discriminatory duty.

In summary, either Proposition I has no effect on pre-existing California law, or it violates the federal equal Protection Clause.

RESPECTFULLY SUBMITTED:



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NO. 81-38

JACK ROBERTSON certifies as follows:

He is an active member of the State Bar of California and not a party to the within action.

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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District.

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No. 81-38

IN THE

Supreme Court of the United States

October Term, 1981

MARY ELLEN CRAWFORD, *et al.*,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

BRIEF OF AMICUS CURIAE THE COUNTY OF LOS ANGELES ON BEHALF OF RESPONDENT.

Interest of Amicus Curiae.

This brief is submitted pursuant to Rule 36.4 of the Revised Rules of the Supreme Court of the United States by the County of Los Angeles, a political subdivision of the State of California and is sponsored by the County Counsel of the County of Los Angeles as the authorized law officer thereof.

The brief is submitted at the direction of the Board of Supervisors of Los Angeles County, the governing body of said County, on motion of Supervisor Michael D. Antonovich, seconded by Supervisor Deane Dana. The remaining members of the Board of Supervisors, Peter Schabarum, Chairman, Edmund D. Edelman and Kenneth Hahn joined in the action authorizing the brief.

This brief is submitted in support of the constitutionality of Article 1, Section 7 of the California Constitution as amended November 6, 1979 (hereinafter referred to as Proposition 1). In so doing, the County is supporting the electors of the County of Los Angeles who voted overwhelmingly to enact Proposition 1.[1]

In the view of the County of Los Angeles, the most important question to be decided by the Court in this case is whether a state may enact requirements for school integration that exceed the mandates of the federal law in some particulars and which mirror the federal requirements in others. The California Constitution as amended by Proposition 1 imposes requirements beyond the federal mandates upon school districts experiencing *de facto* segregation, but stops short of state mandated, disruptive pupil reassignments in those districts. The County believes that Proposition 1 was intended to, and in fact will, serve the best interests of the children of the State and of the County of Los Angeles.

Thus, we urge in this brief that the Court uphold the constitutionality of Proposition 1. In so doing, the Court would be announcing that so long as there is compliance with the requirements of federal law, states are free to require additional steps to integrate schools and still retain the power to limit their efforts to federally mandated levels when they deem that to be desirable. We not only urge that Proposition 1 is constitutional, but maintain that it creates a favorable atmosphere in which to encourage school integration. A fear that any action taken, which exceeds that required by federal law, is irreversible, cannot further the cause of integration.

---

[1]The County-wide vote in favor of Proposition 1 was 775,838 to 273,511, or 73.94% in favor and 26.06% opposed. Official Election Returns for the Special State-wide Election, Los Angeles County, November 6, 1979, compiled by Leonard Panish, Registrar-Recorder.

Summary of Argument.

Proposition 1 does not establish a two-tiered California equal protection clause that affords more protection to one class of persons than to other classes. Article I, Section 7 of the California Constitution has been extended beyond the requirements of the United States Constitution in some instances, and not in others. However, California has not done this in a manner which in any way establishes a pattern of granting benefits to one class of persons while denying benefits to an equivalent class.

The motives of the voters in enacting Proposition 1 are of no relevance in assessing the constitutionality of this law since Proposition 1 does not have a discriminatory effect. It is only when a law has a discriminatory or disparate effect that the courts will then inquire into whether the law was enacted with the invidious intent of causing that discriminatory or disparate effect. Where a law does not have the effect of imposing burdens or denying benefits on an unequal basis, the motives of the persons enacting the law are not relevant to the validity of such a law.

Even if motive were a relevant subject of inquiry in this case, petitioners have not and cannot establish the dominant motive, if indeed one exists, for the millions of votes in support of Proposition 1. A showing of a desire to end the mandatory reassignment and transportation of students to schools far from their homes, absent a showing that such assignments are necessary to remedy a violation of the United States Constitution, is not a showing of discriminatory intent. It would be more appropriate to presume that there was no discriminatory intent behind the vote, since Proposition 1 passed by large margins in both minority and non-minority communities. The California Court of Appeal has already found no invidious motive behind the enactment

of Proposition 1, and that finding is entitled to considerable deference.

Proposition 1 merely amends the California Constitution to conform to the United States Constitution in some respects. It does not repeal any law. However, even if the petitioners were correct in their argument that Proposition 1 is equivalent to the repeal of an existing law, this would be of no significance in determining its validity. The mere repeal of a law not mandated by the United States Constitution cannot be a violation of the United States Constitution. Cases cited by the petitioners and their supporting *amici curiae* as authority to the contrary do not stand for the proposition for which they are cited.

ARGUMENT.

1. Article I, Section 7, of the California Constitution as Amended by Proposition 1 Does Not Embody an Impermissible Racial Classification.

Petitioners and the *amici curiae* supporting their position argue that the people of the State of California have created a dual court system — a first-class judicial system for non-minorities and for problems unrelated to race, and second-class judicial system with less available relief for minorities (See pages 30 and 31, Petitioners' Brief).

Petitioners' equal protection argument assumes that California has consistently granted equal protection and due process relief under Article I, Section 7 in excess of that available pursuant to the United States Constitution. California's refusal to extend relief pursuant to the California Constitution in the form of pupil reassignment to alleviate segregation where such relief is not required by federal constitutional law is understood by petitioners as a single, race-related exception to the general rule that state constitutional relief is available under Article I, Section 7 exceeding that available under corresponding federal provisions.

Petitioners' assumption and argument are incorrect. A review of California law regarding Article I, Section 7, including the provisions of Proposition 1, indicates that relief in excess of that required by the United States Constitution has been granted in some instances and in some instances has been refused. Instances in which extra relief is granted and in which it has been denied show no pattern of racial discrimination.

On page 47 of Petitioners' Brief, five cases are listed in footnote 26 as examples of instances in which the California Supreme Court has relied upon Article I, Section 7 of the

California Constitution to grant relief unavailable pursuant to corresponding federal constitutional law.[2] In an even greater number of cases, the California Supreme Court has declined to interpret Article I, Section 7 to provide relief not called for under federal constitutional provisions.[3]

For example in *Scherling v. Superior Court* (1978) 22 Cal.3d 493, 585 P.2d 219, a criminal defendant sought relief from prosecution for an offense which would have

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[2]*Serrano v. Priest* (1976) 18 Cal.3d 728, 557 P.2d 929, *Serrano v. Priest* (1971) 5 Cal.3d 584, 487 P.2d 1241 (striking down a system of public school financing); *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529 (invalidating a statute prohibiting women from tending bar); *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 625 P.2d 779 (enjoining enforcement of provisions restricting use of public funds to pay for abortions for indigent mothers); *People v. Ramirez* (1979) 25 Cal.3d 260, 599 P.2d 622 (listing due process requirements for exclusion of a patient inmate from a state drug rehabilitation center).

[3]*Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 546 P.2d 687 (invalidation of rule of state labor relations board permitting access to agricultural property by farm labor organization on federal and state due process grounds denied); *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 553 P.2d 624 (writ to compel destruction of arrest record denied); *Miller v. State of California* (1977) 18 Cal.3d 808, 557 P.2d 970 (compulsory retirement not invalidated as violative of California and federal due process clauses); *People v. Superior Court (Hartway)* (1977) 19 Cal.3d 338, 562 P.2d 1315 (refusal of relief based on equal protection claims regarding discriminatory police enforcement practices against female prostitutes; *Toward Utility Rate Normalization v. Public Utilities Commission* (1978) 22 Cal.3d 529, 585 P.2d 491 (court refused to overturn decision of Public Utilities Commission on equal protection grounds); *Price v. Civil Service Commission* (1980) 26 Cal.3d 257, 604 P.2d 1365 (under applicable facts race conscious affirmative action plan not violative of federal and state equal protection clauses); *Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 616 P.2d 1287 (damages for invasion of constitutional due process rights denied where cessation of water services used to enforce collection of unified municipal services bill not paid in full); *Libertarian Party v. Eu* (1980) 28 Cal.3d 535, 620 P.2d 612 (writ based upon equal protection grounds to require certain candidates to be designated by their party rather than as "Independent" denied); *DeRonde v. Regents of California* (1981) 28 Cal.3d 875, 625 P.2d 220 (state equal protection clause does not bar University admission procedures which permit consideration of ethnic minority status).

been barred by the applicable statute of limitations except for provisions tolling the statute of limitations for periods of time during which the defendant was out of state. The Court refused to grant relief under the equal protection clauses of either the federal or state constitutions.

In *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 578 P.2d 925, the court stated:

> "Although in interpreting the scope of the due process clause under the state Constitution, we are not bound by federal decisions analyzing the state action requirement under the Fifth or Fourteenth Amendments (See *Kruger, supra*, 11 Cal.3d 352, 367, fn. 21), we have found no reason to depart from those cases in the present context. We therefore conclude for the reasons set forth above in relation to petitioners' federal Constitution claim that the nonjudicial foreclosure of a deed of trust constitutes private action authorized by contract and does not come within the scope of the California due process clause."

The restriction on relief available pursuant to Article I, Section 7, contained in Proposition 1 is one more such instance where California law does not utilize the equal protection and due process clauses of its Constitution to provide relief beyond that available under federal law. In order to determine whether the present form of Article I, Section 7 of the California Constitution contains racial classifications or has been applied in an invidiously discriminatory manner, it is necessary to compare the instances in which it has been the source of extra relief and the instances where no relief beyond that available under federal constitutional law has been required.

An examination of California law relating to Article I, Section 7 of the California Constitution[4] thus reveals that relief in addition to that provided by the United States Constitution has been made available in circumstances involving school finance (*Serrano v. Priest*), women bartenders (*Sail'er Inn, Inc. v. Kirby*), publicly funded abortions (*Committee to Defend Reproductive Rights v. Myers*), due process prior to exclusion from state drug rehabilitation center (*People v. Ramirez*). On the other hand, relief in excess of that provided by the United States Constitution has been withheld in instances involving state labor board regulations (*Agricultural Labor Relations Board v. Superior Court*), arrest records (*Loder v. Municipal Court*), compulsory retirement (*Miller v. State of California*), criminal law (*People v. Superior Court* (*Hartway*)), public utilities regulations (*Toward Utility Rate Normalization v. Public Utilities Commission*), affirmative employment action (*Price v. Civil Service Commission*), city collection practices (*Perez v. City of San Bruno*), elections (*Libertarian Party v. Eu*), affirmative action in University admissions (*DeRonde v. Regents of California*), nonjudicial foreclosure of deeds of trust (*Garfinkle v. Superior Court*), and pupil reassignment pursuant to the provisions of Proposition 1.

Scrutiny of the instances listed above in which Article I, Section 7 extra relief is available or unavailable produces no racial classification. No racial classification is to be found in the instances in which extra relief has been granted. No racial classification is to be found in the instances in which extra relief has been denied. To the extent California grants

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[4]Citations to cases referenced in the first sentence of this paragraph are found in footnote 2. The remainder of the cases are cited in footnote 3 except *Garfinkle v. Superior Court, supra* (1978) 21 Cal.3d 268, 578 P.2d 925.

or withholds relief beyond that available under the federal equal protection and due process clauses, it does so without regard to race.

2. The Motives of Those Persons Voting to Enact Proposition 1 Are Not Relevant to the Constitutionality of Proposition 1.

Petitioners and their supporting *amici curiae* have devoted substantial portions of their briefs in support of the argument that Proposition 1 is unconstitutional because invidious motives were allegedly behind its enactment. However, these briefs devote little discussion to whether this is a proper case for inquiry into the motives giving rise to the enactment of the law in question.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, cited by petitioners, this Court reviewed with approval the California Supreme Court's inquiry into the "immediate objective," "ultimate effect," and the "historical context and the conditions existing prior to its enactment" of a State Constitutional provision specifically allowing private housing discrimination. In issue in the case was whether clearly discriminatory private conduct became state action proscribed by the Fourteenth Amendment because of the nature of the enactment and the circumstances surrounding its adoption. This is far different from the matter herein where there clearly is state action, but certainly no discriminatory effect since the enactment in question requires compliance with the Fourteenth Amendment.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555, and in *Washington v. Davis* (1976) 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040, this Court did hold that an inquiry into motives is necessary where there is a showing of a disparate impact of governmental action in

order to determine whether such disparate impact was the result of invidious intent. In *Village of Arlington Heights*, a builder was denied the zoning changes necessary to allow the building of a large integrated housing project for low- and moderate-income families in an almost exclusively non-minority area. This Court recognized that this showing of disparate impact on low-income and minority persons was not enough in and of itself to constitute a violation of the Fourteenth Amendment. A showing that such an impact was the result of invidious intent on the part of the state was also considered necessary.

In *Washington v. Davis*, a governmental body's preemployment test which excluded a disproportionate number of Blacks was attacked as violating the Fourteenth Amendment. This Court held that this disparate impact in and of itself was not sufficient to show a constitutional violation. A showing of invidious intent was also necessary.

On the other hand, where governmental action has no particular disparate impact which burdens or benefits members of one race or ethnic group over others, the courts have consistently held that the motive behind the governmental action is not relevant to the validity of the action. Thus, in *United States v. O'Brien* (1968) 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, the Court refused to overturn the conviction of a person convicted of burning his draft card, rejecting the argument that the law proscribing the destruction of a draft registration certificate was enacted with the intent of inhibiting the freedom of speech. The Court at 391 U.S. at 383, 20 L.Ed.2d at 683, stated:

> "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

> " 'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be executed.' *McCray v. United States* (1904) 195 U.S. 27, 56; 49 L.Ed. 78, 95; 24 S.Ct. 769."

This rule has even been applied in cases where an otherwise neutral governmental action was alleged to have been motivated by an intent to avoid integration. In *Palmer v. Thompson* (1971) 403 U.S. 217, 29 L.Ed.2d 438, 91 S.Ct. 1940, the Court reviewed the closing of all municipal swimming pools by a city shortly after that city was ordered to integrate its public facilities, including the swimming pools. The Court rejected the argument that the action was invalid because the motive of the city was to avoid integrating the pools. The Court at 403 U.S. at 224-225, 29 L.Ed.2d at 444-445 stated:

> "[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. . . .
>
> "It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons."

Proposition 1 merely provides that with regard to pupil reassignments mandated by a court of law, the California rule will be equivalent to the Federal rule. It is difficult to imagine how a law that requires compliance with the United States Constitution can have a discriminatory or disparate

impact. Proposition 1 applies to all persons in California. It does not exclude any group from the public schools, nor does it provide any group with a better public education than any other group.

Petitioners' claim with regard to the motivations behind the passage of Proposition 1 is no more meritorious than the claim of the plaintiff in *Palmer v. Thompson, supra.* Because the law has no disparate or discriminatory impact, the motivations of those voting to enact Proposition 1 are not relevant to its validity.

3. Even if Intent Were Relevant in Determining the Validity of Proposition 1, Petitioners Have Not Shown and Cannot Show That the Adoption of Proposition 1 Was an Act Motivated by Invidious Discriminatory Intent.

Even though we have asserted the position that the intent behind the enactment of Proposition 1 is not relevant in determining its validity, the assertion of petitioners that they have shown a discriminatory motive should not go unchallenged. Nothing presented by petitioners or their supporting *amici curiae* establishes an invidious motive on the part of the voters.

The statements of petitioners as to the motives of those voting for Proposition 1 are nothing more than speculation. Indeed, any conclusion as to the motivations behind the millions of votes for Proposition 1 would necessarily be the result of pure speculation.

Proposition 1, itself, declares that its purpose is:

> ". . . to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of

> all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

How is it possible for anyone to say that one or more of the above reasons were not the only or at least the primary motivation behind the votes of those persons voting for Proposition 1?

Petitioners and their supporting *amici curiae* cite newspaper articles and ballot arguments in support of their assertion of a general opposition among the citizens of California to forced reassignment of students, and argue that Proposition 1 was perceived as and supported because it was a vehicle for ending mandatory pupil reassignments in some California school districts, including Los Angeles. However, such a showing does not begin to show discriminatory or segregative intent.

To be against the mandatory reassignment of students to schools some distance from home, when not compelled by federal law, does not necessarily imply opposition to racial integration. The voters of California could have been voicing their opposition to the unnecessary placement of young children on school buses to travel far from home to attend school each day. They could have been voicing their opposition to children unnecessarily spending large amounts of time on school buses when the time could be better spent on homework or recreation. They could have been voting to support integration by opposing the very unpopular integration plan in existence in Los Angeles which physically integrated few schools and which drove thousands of nonminority students from the school system, thus making more meaningful integration of schools, as neighborhood integration advances, more difficult.

Any one of these, or any number of other reasons, could have been the motivation or those persons voting for Proposition 1. Opposition to racial integration may have been a factor behind the votes of some voters. However, it is pure speculation to conclude that such a motive was the predominant motive or even a significant one.

Indeed, the facts suggest just the opposite. Proposition 1 received overwhelming statewide support. It was supported by non-minority and minority communities alike. For example, Proposition 1 won a majority of the votes in all but one of the seventeen Congressional districts in Los Angeles County, all but one of the sixteen State Senate districts, and all but one of the thirty State Assembly districts. It carried in all five Supervisoral districts in the County. Of the seventy-nine cities located within the County, it carried in all but two (and in one of these two it lost by only one vote). Of the one hundred public school districts located within the County, it carried in all but one.

The districts in which Proposition 1 passed include predominantly minority districts, which at the time were represented by minority group representatives. In the four Congressional districts within the County represented by minority group Congressmen, Proposition 1 passed by over 56% of the vote. In the five State Senate districts in the County represented by minority group Senators, Proposition 1 passed by almost 61% of the vote. In the seven State Assembly districts within the County represented by minority group Assemblymen, Proposition 1 passed by over 59% of the vote.[5]

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[5]Official Election Returns for the Special Statewide Election, Los Angeles County, November 6, 1979, compiled by Leonard Panish, Registrar-Recorder.

In making its inquiry into the intent behind the enactment of the constitutional provision under consideration in *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, the Court recognized that the California Supreme Court had reviewed the issue and indicated that the California Court's determination on this question was entitled to substantial deference because that Court was "armed with the knowledge of the facts and circumstances concerning the passage and potential impact of Proposition 14, and familiar with the milieu in which that proposition would operate." (*Id.*, 387 U.S. at 378, 18 L.Ed.2d at 836.) Similarly in this case, the California Court of Appeal "armed with the knowledge of the facts" found no discriminatory purpose or intent in the enactment of Proposition 1. *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633, 645-655, 179 Cal.Rptr. 495. This finding is further evidence of the invalidity of the argument of petitioners regarding motive and intent.

Consequently, it is submitted that even if intent or motive were a relevant issue in this matter, the Court would be compelled to conclude that there was no invidious intent which motivated the passage of Proposition 1.

4. Amending a Law to Embrace the United States Constitution Cannot Be a Violation of the United States Constitution.

Proposition 1 did nothing more than interpret the California Constitution to embrace the requirements of the United States Constitution on the issue of court-ordered pupil assignments for school integration purposes. Proposition 1 goes no further. It does not prohibit the State Legislature from enacting legislation that goes beyond the Federal Constitution. It does not make the enactment of a law dealing with school integration any more difficult than the

enactment of a law on any other subject. It does not even reach the level of a repeal of an existing law as petitioners and their supporting *amici curiae* argue. However, even if Proposition 1 did somehow constitute the repeal of any existing law, this would be of no legal consequence.

The mere repeal of a state law not required by the United States Constitution cannot be a violation of the United States Constitution. *Reitman v. Mulkey* (1967) 387 U.S. 369, 376, 18 L.Ed.2d 830, 835, 87 S.Ct. 1627; *Hunter v. Erickson* (1969) 393 U.S. 385, 390, note 5, 21 L.Ed.2d 616, 621, 89 S.Ct. 557. In *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 414, 53 L.Ed.2d 851, 859, 97 S.Ct. 2766, the Court in reviewing a school board rescission of a previously existing integration program, quoted with approval the opinion of the Court of Appeals in the same case as follows:

> " 'The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. . . . If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation.' "

Similarly in this case, the citizens of California have chosen to modify a law to embrace the provisions of the United States Constitution. To the extent this law previously required something more than is required by the United States Constitution, that "something more," by definition, could not be required by the United States Constitution. Consequently, a modification to remove a portion of that "something more" cannot be a violation of the United States Constitution.

The petitioners and their supporting *amici curiae* have cited cases in support of the proposition that the mere repeal of a state law can constitute a violation of the United States Constitution. All of the cited cases, however, are clearly distinguishable from this case.

In *Reitman v. Mulkey* (1967) 387 U.S. 369, 18 L.Ed.2d 830, 87 S.Ct. 1627, the Court was concerned with another California Constitutional amendment that repealed a State fair housing law, and also prohibited the enactment of any other fair housing laws in the State. It was not the repeal of the existing law that the Court found to offend the Constitution, however. The Court found that in enacting a State Constitutional provision specifically granting to citizens the right to sell their property to whomever they pleased, the State had specifically authorized private housing discrimination. This authorization, the Court found, had the effect of converting what is normally considered private discrimination, not controlled by the Constitution, into State discriminatory action, specifically prohibited by the Fourteenth Amendment to the United States Constitution. This situation is in no way analogous to the facts in the instant case, and the holding of *Reitman v. Mulkey* has no application to this case.

Petitioners also rely upon *Hunter v. Erickson* (1969) 393 U.S. 385, 21 L.Ed.2d 616, 89 S.Ct. 557. In that case a city amended its charter to provide that any city ordinance that regulated real property transactions on the basis of race, color, religion, national origin or ancestry would have to be approved by a majority vote of the city electors at a general election before becoming effective. Such voter approval was not needed for city ordinances dealing with other issues.

This provision in the city charter had the effect of repealing a previously existing fair housing ordinance. How-

ever, it was not merely this repeal that the Court found to be in violation of the Constitution. What the Court held was that the charter provision by treating racial housing matters differently from other housing matters was a racial classification on its face, which violated the Fourteenth Amendment.

Hunter v. Erickson is, therefore, very different from the facts in this case. Proposition 1 does not make the enactment of legislation dealing with school integration more difficult to enact. It does not make any racial classifications. It merely conforms the California Constitution to the United States Constitution in one area. A law which by its very terms embraces the United States Constitution is hardly analogous to the racial classification under review in *Hunter v. Erickson*.

A declaration that Proposition 1 is unconstitutional on the basis of the rationale in *Hunter v. Erickson* would require a significant extension of the holding in *Hunter v. Erickson*. In the past, the Court has rejected even a modest extension of the holding in this case. See *James v. Valtierra* (1971) 402 U.S. 137, 141, 28 L.Ed.2d 678, 682, 91 S.Ct. 1331.

The "Brief of Amici Curiae Margaret Tinsley Et Al In Support of Petitioners" cites a number of cases in support of the assertion that "the Fourteenth Amendment may be violated by a state law repealing prior laws." (Brief pp. 35-36) However, none of the cited cases support this assertion. All of the cited cases were grounded on state action other than the mere repeal of a state enactment.

In *Griffin v. School Board of Prince Edward County* (1964) 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226, a school district after being ordered by the Supreme Court to integrate its schools (*Davis v. County School Board of Prince Edward County* (1954) 347 U.S. 483, 98 L.Ed. 873,

74 S.Ct. 686), closed all the public schools and contributed to the support of the segregated private schools that replaced them on the former public school sites. The Court in finding this action unconstitutional was hardly basing its decision merely on the action repealing the law establishing a public school system. It was the entire scheme, obviously designed to circumvent the Court's prior order, that was constitutionally offensive.

Hall v. St. Helena Parish School Board (E.D. La. 1961) 197 F.Supp. 649, affirmed per curiam (1962) 368 U.S. 515, 7 L.Ed.2d 521, 82 S.Ct. 529, also cited by the Tinsley *amici curiae* had almost identical facts to those in *Griffin*.

In *Gomillion v. Lightfoot* (1960) 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125, the Court struck down a law which changed the boundaries of a city to exclude almost all city residents who were Black, but which did not exclude one White city resident. This case obviously did not at all deal with the mere repeal of a law and was declared invalid, not as a violation of the Fourteenth Amendment, but as a denial of the right to vote under the Fifteenth Amendment.

Rice v. Elmore (4th Cir. 1947) 165 F.2d 387, cert. denied 333 U.S. 875, 92 L.Ed. 1151, 68 S.Ct. 905, was one of the White primary cases. It involved a state which, after being ordered to allow Black persons to vote in the primary, repealed all of its primary laws and left it up to the Democratic Party to determine who could vote. The Democratic Party rules did not grant the right to vote to Black persons. The Court found that since the primary in the overwhelmingly Democratic state was the only real election contest, the conducting of the election was the exercise of state action and the exclusion of persons on the basis of race violated the Constitution. The Court could hardly be said to have based its decision on the mere repeal of state laws concerning the holding of primary elections.

United States v. Board of School Commissioners of the City of Indianapolis (7th Cir. 1978) 573 F.2d 400, cert. denied *sub nom. Bowen v. U.S.*, 439 U.S. 824, 58 L.Ed.2d 116, 99 S.Ct. 93, was a school integration case reviewing the possible imposition of an interdistrict pupil reassignment remedy. The Court in this case considered a repeal of a law along with the enactment of another law and found these legislative actions coupled with other considerations to be factors showing interdistrict actions that could possibly support the imposition of an interdistrict remedy. Whatever precedential value this case has, it certainly does not stand for the proposition that the mere repeal of a law standing alone can be a violation of the Constitution.

Finally, in *Lee v. Nyquist* (W.D., N.Y. 1970) 318 F.Supp. 710, affirmed per curiam 402 U.S. 935, 29 L.Ed.2d 105, 91 S.Ct. 1618, also cited by *amici curiae* Tinsley, et al., the Court was not concerned with the repeal of a law at all, but the enactment of law that prohibited unelected school boards from voluntarily adopting integration plans that involved pupil reassignments even in instances where the existing segregation had been intentionally caused.

Consequently, it is clear that neither petitioners nor their supporting *amici curiae* have been able to cite any authority for the novel proposition that the mere repeal of a state law not mandated by the United States Constitution can be a violation of the United States Constitution. Indeed, there is no authority for such a proposition.

It has long been recognized that a state has the same unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction has not been surrendered or restrained by the United States Constitution. *New York v. Miln* (1837) 11 Peters 102, 139, 9 L.Ed. 648, 662. It would, of course, be anomalous to conclude that in enacting the Fourteenth Amendment the

states surrendered their right to enact a state law embracing the Fourteenth Amendment.

Mr. Justice Rehnquist, sitting as a Circuit Justice in *Board of Education of the City of Los Angeles v. Superior Court of California* (1980) 448 U.S. 1343, 65 L.Ed.2d 1166, 1168, 101 S.Ct. 21, recognized the inconsistency of petitioners' argument herein when he quoted from the ruling of Judge Cohn of the Superior Court of San Mateo County, California, in *Tinsley v. Palo Alto Unified School District* (July 10, 1980) No. 206010, as follows:

> " 'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.' "

Conclusion.

Prior to the enactment of Proposition 1, California Constitution Article I, Section 7 read as follows:

> "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

Section 1 of the Fourteenth Amendment to the United States Constitution, in relevant part, provides as follows:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The United States Supreme Court has interpreted the above language of the Fourteenth Amendment to require a showing that existing school segregation is the result of

intentionally segregative action on the part of school authorities before a court can order the reassignment of pupils for integration purposes. *Dayton Board of Education v. Brinkman* (1977) 433 U.S. 406, 53 L.Ed.2d 851, 97 S.Ct. 2766.

However, despite the similarity between the above two constitutional provisions, the California Supreme Court has held Article I, Section 7 to require California school districts to integrate regardless of the cause of the segregation that exists. *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 551 P.2d 28.

If the citizens of the State of California do not agree with their Supreme Court's interpretation of their State Constitution, are they powerless to effect a change? Is the act of changing the interpretation of the California Constitution to conform to the interpretation of the almost identical language in the United States Constitution somehow a segregative act?

Certainly the California Supreme Court could have changed its interpretation of the California Constitution to conform to this Court's interpretation of the Fourteenth Amendment if it chose to do so. Surely the people of the State of California, vested with the sole right to amend the California Constitution, have at least an equal right to do likewise.

Proposition 1 only changed the California law with regard to court-ordered mandatory reassignment of pupils to remedy purely *de facto* segregation. The California courts may still order California school districts to take all reasonable and feasible steps, short of mandatory pupil reassignments, to correct school segregation regardless of its cause, and may order the mandatory reassignment of pupils when the United States Constitution requires it. California school

districts may still voluntarily adopt integration plans which involve mandatory pupil reassignments to remedy segregation regardless of its cause. The California rule, therefore, still exceeds the requirements of the Fourteenth Amendment and of the other states. How can a rule exceeding the Fourteenth Amendment and the requirements of the other states possibly be a violation of the Fourteenth Amendment?

For all of the foregoing reasons, it is submitted that the constitutionality of Proposition 1 should be sustained.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

MARY ELLEN CRAWFORD, etc., et al.,
Petitioners,

VS.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the California Court of Appeal Second Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees (Board) composed of concerned

citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation believes that this case is of great importance to all citizens of the United States in that it generally questions whether an amendment to a state constitution which explicitly incorporates all the guarantees of the United States Constitution can itself violate the Federal Constitution. This issue arises within the context of school desegregation and specifically queries whether the people of a state, speaking through their constitution, can limit certain court ordered remedies for segregation to those which would be allowed under the Federal Constitution.

The constitutional nature of these issues and the setting in which they arise make it clear that the impact of this Court's decision in this case will be felt by many members of the public, and particularly students and their parents, in addition to the private petitioners and individual respondent school board represented herein. Because of the national significance of the case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

Petitioners, respondent, and the intervenor below have consented to the filing of this brief. These consents have been lodged with the Clerk of this Court.

OPINION BELOW

The opinion of the court below is reported at 113 Cal. App. 3d 633 (1980).

STATEMENT OF THE CASE

At issue in this case is the constitutionality of article I, section 7(a) of the California Constitution, as amended by Proposition 1. This section provides:

> "§ 7. Due process and equal protection; pupil school assignment and transportation
>
> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligation or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.
>
> "Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil

school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

"In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

The instant challenge to Proposition 1 arises in the context of a case filed in the Los Angeles Superior Court in 1963. A statement of the case detailing both the factual and

procedural background of this case is set forth by respondent Board of Education of the City of Los Angeles in its brief in opposition to petition for certiorari filed with this Court and is adopted herein.

SUMMARY OF ARGUMENT

Petitioners have raised several questions in challenging the constitutionality of Proposition 1. It is not the intention of amicus to deal with each of these questions. However, Pacific Legal Foundation does strongly oppose the position taken by petitioners that Proposition 1 establishes an impermissible racial classification and is inconsistent with prior rulings of this Court and unconstitutional under the Equal Protection Clause of the United States Constitution. In making this assertion, petitioners have both mischaracterized the effects of Proposition 1 and misconstrued the applicable case law. Proposition 1 creates no racial classification nor does it impose unconstitutional burdens of the nature imposed in *Hunter v. Erickson (Hunter)*, 393 U.S. 385 (1969), upon which petitioners rely.

Further, amicus takes issue with petitioners' assertions that Proposition 1 is unconstitutional in that it removes the only effective remedy they have for educational segregation. Initially, in the absence of a constitutional violation petitioners have no right to any remedy at all, let alone any specific remedy. Accordingly, a removal of such a remedy does not in itself constitute an unconstitutional act. More specifically, in denominating court ordered pupil school assignment or pupil transportation as the only effective remedy for segregation, petitioners have chosen to ignore the nature of the ills the remedy is supposed to cure and the realities of the remedy itself.

Amicus also stresses that Proposition 1 does not inhibit the authority of local school boards to take all appropriate

measures to alleviate *de facto* segregation and that school boards are the entities best equipped to deal with the complexities of *de facto* segregation.

Finally, amicus urges the Court to consider, as does Proposition 1, the compelling public interest in enhancing all aspects of a child's education. Busing a child to a school far from his home may preclude participation in developmental extracurricular activities and discourage parental involvement and interest in school functions. In consideration of these negative educational aspects as well as the physical strain of long bus rides, Proposition 1 wisely restricts the use of involuntary busing to those instances in which it may be required as a remedy for specific constitutional violations.

ARGUMENT

I

PROPOSITION 1 DOES NOT VIOLATE THE FEDERAL CONSTITUTION

Petitioners have asserted that Proposition 1 is an explicit racial classification which violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Such a position is fatally defective from the onset.

To analyze the defects of petitioners' position, it is initially necessary to determine precisely what Proposition 1 accomplishes and what it does not. First, the Proposition provides that the California Constitution imposes upon the state, its officials, its public entities, and boards precisely the same duties imposed upon these entities by the Federal Constitution with respect to the use of pupil school assignment and transportation. It goes on to provide that in enforcing the equal protection and other guarantees of the state constitution

> "no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution." Cal. Const. art. I, § 7(a).

This means that a California court may order a school board or other public entity to impose mandatory student assignment or transportation when it has been shown that a school district has been purposefully (*de jure*) segregated, but not when it has been shown that a district has been unintentionally (*de facto*) segregated. In this respect Proposition 1 conforms to and embodies all the guarantees of federal law, as is explicitly set forth in its text.

On the other hand, Proposition 1 does not mean that a California court cannot order remedies other than mandatory student assignment or transportation for districts found to be *de facto* segregated, and in this respect exceeds the guarantees of federal law in that federal law does not provide for any court ordered remedies unless *de jure* segregation has been proven. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). Further, the Proposition does not prevent public entities from voluntarily imposing student assignment or transportation programs to encourage desegregation. Indeed, it explicitly states that such programs are not prohibited.

With these parameters of Proposition 1 in mind, it is difficult to comprehend petitioners' assertions that a racial classification has been adopted. As noted by respondent in its Brief in Opposition to Petition for Writ of Ce 'iorari (Opposition), if Proposition 1 embraces any classification at all, it is only one which relates to court ordered remedies for *de facto* segregation (Opposition at 15).

It is possible that petitioners, in making their arguments, have confused Proposition 1, which touches upon race by dealing with remedies for racial problems, with governmental efforts which create racial classifications. While the latter are constitutionally suspect, the former is not. This is made particularly clear in *Brown v. Califano,* 627 F.2d 1221 (D.C. Cir. 1980), in which plaintiffs challenged provisions of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701, *et seq.* These provisions read that unless required by the dictates of the Fifth or Fourteenth Amendments, no court, department, or agency of the United States could order the implementation of a plan which would require student transportation to schools other than those closest or next closest to the student's place of residence. 20 U.S.C. §§ 1702(b), 1714(a). This Act therefore, like Proposition 1, dealt with a racial issue and had the effect of limiting forced student transportation to that which might be required by the United States Constitution, *Morgan v. Kerrigan,* 530 F.2d 401, 411 (1st Cir. 1976), *cert. denied,* 426 U.S. 935 (1976). In reviewing the challenged portions of the Act, the Court in *Brown v. Califano* explicitly found "no classification upon impermissible lines." *Id.* at 1230. With reference to Proposition 1, *Brown v. Califano* thus agrees that the Proposition's limitation of student transportation and assignment remedies to those situations in which these are required by the United States Constitution does not in itself create an impermissible racial classification.

After determining that no impermissible classification was made by the challenged provision of the Equal Educational Opportunities Act, the court in *Brown v. Califano,* 627 F.2d at 1230, did go on to add the caveat that such a determination did not prevent an equal protection challenge and noted: "Interference with the remedies necessary to implement the promise of *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), could well rise to the level of impermissible discriminatory effect and purpose." Proposition 1, however, far from interfering with the promise of *Brown v. Board of Education,* incorporates this promise through its adherence to the rights and remedies established by federal law.

In spite of the reasoning in *Brown v. Califano,* petitioners persist in their racial classification characterization of Proposition 1 and stress that under federal constitutional standards it impermissibly removes from racial minorities rights and remedies previously guaranteed to them under the California Constitution. In adopting this tack, petitioners rely most heavily upon the holdings in *Hunter, supra, and Lee v. Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd,* 402 U.S. 935 (1971).

Prior to the inclusion of Proposition 1 in the California Constitution, the California Supreme Court had interpreted the equal protection clause of this constitution to place upon school boards a constitutional obligation to take reasonably feasible steps to alleviate racial segregation whether such segregation is *de jure* or *de facto.* If such steps were not taken, they could be ordered by a court. *Crawford v. Board of Education,* 17 Cal. 3d 280, 289-302 (1976). This interpretation of the equal protection clause of the California Constitution is dissimilar to the interpretation given by the federal courts to the Fourteenth

Amendment in that under the latter, a constitutional violation occurs only if a school district has been purposefully *(de jure)* segregated and absent such a constitutional violation there is no basis for court ordered desegregation. *Columbus Board of Education v. Penick,* 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman,* 443 U.S. 526 (1979); and *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976).

The effect of Proposition 1 is to bring the California Constitution into conformity with the Federal Constitution to the extent that now, under both constitutions, no duty exists on the part of a school board to remedy *de facto* segregation by means of mandatory student assignment or transportation programs and no such programs may be court imposed. In this respect certain desegregation remedies once available to remedy *de facto* school segregation in California no longer exist, as petitioners assert.

However, this removal of remedies does not constitute a violation of the Federal Constitution. This has been emphasized by this Court in both *Dayton I* and *II* (*Dayton Board of Education v. Brinkman,* 433 U.S. 406, 413-14 (1977), and *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 531 n.5 (1979)), wherein it was determined that rescission of a governmental enactment violates the Federal Constitution only if the enactment was required by a pre-existing federal constitutional duty. In the present case, as outlined above, there exists no federal constitutional duty on the part of school boards or other governmental entities to alleviate *de facto* segregation in any manner since *de facto* segregation alone is not violative of the Federal Constitution. Accordingly, there is no federal requirement that courts, having found *de facto* segregation, order palliative measures of any sort. Indeed they cannot do so. Thus the duty imposed upon school boards to remedy *de facto* segregation and the authority given to the courts to

order such remedies, as set forth in California decisional law prior to the passage of Proposition 1, were not required by the Federal Constitution. Therefore, pursuant to the reasoning in both *Dayton* cases, the removal of such duty and court authority cannot be made an unconstitutional act.

It is not necessary, however, to rely on the *Dayton* reasoning to support Proposition 1's constitutionality. *Hunter, supra,* upon which petitioners rely so heavily also supports this position. In *Hunter,* the City Council of Akron, Ohio, enacted a fair housing ordinance. Following this enactment, the Akron City Charter was amended to provide that any ordinance enacted by the city council regulating the use, sale, rental, or transfer of any interest in real property on the basis of race, color, religion, national origin, or ancestry must be approved by a majority of the voters before becoming effective. Other ordinances did not have to obtain this voter approval. The effect of the amendment was to repeal the pre-existing fair housing ordinance inasmuch as it could not become effective until approved as specified in the amendment.

Plaintiff challenged the constitutionality of the amendment under the Equal Protection Clause of the Fourteenth Amendment and this Court determined that it was indeed unconstitutional in that it created an impermissible racial classification. However, this Court also explicitly stated that it was *not* holding that repeal of an existing ordinance violated the Fourteenth Amendment. *Hunter,* 393 U.S. at 390 n.5. Thus, it is well settled that the repealing aspects of Proposition 1 alone cannot make it unconstitutional.

This Court's act of holding the amendment in *Hunter* unconstitutional also fails to support present petitioners' position that the provisions of Proposition 1 create a racial

classification impermissible under the Fourteenth Amendment. In *Hunter*, the challenged amendment created an explicit racial classification by requiring that only ordinances dealing with racial housing matters meet with voter as well as city council approval. This was held by this Court to place "special burdens on racial minorities within the governmental process." *Hunter*, 393 U.S. at 391. This holding is quite easy to understand inasmuch as in *Hunter*, the passage of certain racial legislation required a two-step process, while the passage of other legislation required only one step. The creation of such a process was clearly in violation of previous holdings of this Court which decried the imposition of racial burdens in the electoral process. *Cf. Anderson v. Martin*, 375 U.S. 399 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Proposition 1 is in no manner similar to the amendment in *Hunter*. In the first place, it creates no explicit racial classification. In the second, inasmuch as Proposition 1 ties California's constitutional rights and remedies to those of the United States Constitution, the only "burdens" it creates are those created by the United States Constitution, rather than those forbidden by it.

Lee v. Nyquist (Lee), 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), on which petitioners also rely is somewhat more similar to the present case than *Hunter* in that it deals with a state measure which concerns student school assignments. Again, major differences between the legislation held unconstitutional in *Lee* and Proposition 1 prevent the application of the holding in that case to the instant action.

The New York statute ruled unconstitutional in *Lee* provided that no student could be assigned or compelled to attend a school on account of race, creed, color, or national origin or for the purpose of achieving a balance of students according to race, creed, color, or national

origin except with the approval of a board of education, the majority of whose members were elected. Thus, appointed school officials were prohibited from implementing programs to achieve racial balance by means of student assignment. In addition, the New York Commissioner of Education was prohibited from ordering school board compliance with state educational policies through racial student assignment. It certainly can be argued that these flat prohibitions created impermissible racial classifications or burdens of the type held unconstitutional in *Hunter*.

However, unlike the enactment examined in *Lee*, Proposition 1 does not prohibit school officials from implementing programs of student school assignment and transportation. In fact, it explicitly allows voluntary implementation of these programs. Further, it does not hinder the carrying out of state educational policy. Rather it constitutionally defines this policy, with regard to student transportation and school assignment, as being co-extensive with federal constitutional and decisional law and provides specifically that student assignment and transportation may be ordered to effectuate this policy.

The notion that such a scheme could itself be unconstitutional is novel, to say the least, as was recognized by both the decision of the court below (*Crawford v. Board of Education of the City of Los Angeles*, 113 Cal. App. 3d 633, 654 (1980)), and by Justice Rehnquist of this Court. Justice Rehnquist noted, in discussing petitioners' assertions in a denial of respondent's application for a stay of an order of the California Supreme Court which left standing a 1980 order of the trial court in this case requiring mandatory pupil assignment in spite of the provisions of Proposition 1:

> " 'Turning to the argument that Proposition I violates the 14th Amendment of the U. S. Constitution, inasmuch as it merely limits California courts to what

the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution'." *Board of Education of the City of Los Angeles v. Superior Court*, 448 U.S. 1343, 1345 (1980).

II

INVOLUNTARY BUSING IS NOT THE ONLY EFFECTIVE REMEDY FOR DE FACTO SEGREGATION

In arguing that *Hunter* and its progeny such as *Lee* require a determination that Proposition 1 is unconstitutional, petitioners stress the dire effects and "burdens" brought about by the Proposition, first in the form of the enormous litigation task that faces minority children seeking to establish *de jure* segregation in order to open the door to court ordered student transportation remedies. Petition for Writ of Certiorari (Petition) at 34-36. However, these "burdens" or effects flowing from Proposition 1 are precisely those established by the Federal Constitution. Consequently, even were the burdens of the Proposition as great as those depicted by petitioners, their creation would fail to constitute a violation of the Constitution.

Petitioners concede that they do not have an abstract constitutional right to any particular court ordered remedy for educational segregation. However, they argue that they do have such a right to effective remedies under the circumstances. Petition at 60. Characterizing court ordered student assignment and transportation as the only remedies which can effectively desegregate the Los Angeles schools and which can rectify segregation regardless of cause, petitioners then proceed to argue that the removal of these remedies also places unconstitutional burdens upon

them. Petition at 59-60. At the onset it should be reemphasized that petitioners have no federally guaranteed right to any racial proportionality in the schools unless segregation exists which was caused by intentional governmental action. Accordingly, the removal of any desegregation remedy in a situation in which only unintentional segregation exists cannot be considered an unconstitutional act. However, in characterizing student school assignment and transportation as the "only" remedies for educational segregation, petitioners have gone far beyond what has been judicially and academically accepted and for this reason, if for none other, their position warrants closer examination.

In order to assess any remedy suggested to end segregated schools, it is necessary initially to comprehend what is sought to be accomplished by an end to educational segregation. As was recognized by the California Supreme Court when the present case was before it in the initial stages:

> "[T]he goal sought to be achieved is not simply the mixing of races to satisfy statistical predilections, but rather the elimination of the varied harms to minority children which have generally flowed from the maintenance of segregated schools. [Citations omitted.] In seeking to accomplish this end, desegregation plans must be tailored to the peculiar circumstances of the school district at hand, and the adequacy of alternative courses of action need not be judged simply by the quantitative 'amount' of desegregation which each alternative is expected to achieve." *Crawford v. Board of Education of the City of Los Angeles,* 17 Cal. 3d at 308.

Accordingly, even were it true that pupil assignment or transportation were the only devices which, in Los Angeles, would produce a racial mix satisfactory to petitioners, it does not follow that this remedy is the only one available or necessary to achieve the broader goals of educational segregation.

This also was recognized by the California Supreme Court in *Crawford* when it indicated that student busing is merely "one potential tool" which might be utilized to achieve desegregation (*id.* at 309) and noted further that

> "in some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.*

In the years since the end to unlawful desegregation was mandated by this Court in *Brown v. Board of Education*, 347 U.S. 483, a significant amount of academic research and analysis has been conducted examining the effects of desegregation in general and in particular the "costs" of desegregation accomplished by mandatory student school assignment and transportation. The result of this research and analysis goes far in showing that if the goal of desegregation is "the elimination of the harms to minority children which have generally flowed from the maintenance of segregated schools," rather than a specific racial mix, as indicated by the California court in *Crawford*, 17 Cal. 3d at 308, mandatory student school assignment or transportation is not the panacea represented by petitioners.

Certain studies such as those of David J. Armor, reported in his article "The Evidence on Busing" published in *Public Interest*, No. 28 (Summer 1972), have indicated that mandatory busing of students to achieve integration does not result in the attainment of integration goals such as increased academic achievement or improved self-image

for minority youngsters or the improvement of racial relations. In fact, Armor, in the analysis of his research, found the opposite to be true and concluded that mandatory busing was *not* effective as a means to obtaining these benefits. Even proponents of the mandatory student assignment and transportation remedies, while criticizing studies and analyses such as those of Armor, have failed to demonstrate that these devices significantly alieviate problems related to academic insufficiency or racial disharmony. *See,* for example, G. Orfield, *Must We Bus?* (1978).

Further, James Coleman, whose findings in 1966 were strongly supportive of the benefits of integration for minority children (*see* U.S. Department of Health, Education and Welfare, *Equality of Educational Opportunity* (1966)), has since concluded that busing has the effect of removing any potential integration benefits from minority and white children alike in that it results in a white exodus from the affected district. *See* J. Coleman, S. Kelly, and J. Moore, *Trends in School Segregation* 1968-73 (1975). Consequently, if Coleman's conclusions are to be considered, the utilization of mandatory student transportation and school assignment techniques may serve to defeat even numerically oriented desegregation goals by reducing the possibilities of the mixing of races within a district's schools.

Although this Court has held in *Swann v. Charlotte-Mecklenburg Board of Education* (*Swann*), 402 U.S. 1 (1971), that it is within a district court's power to order the transportation of students as a remedy for intentional segregation practiced by a school district, the court has not taken the position that such transportation, even in the setting of intentional segregation, is the only effective remedy. Indeed in *Swann,* 402 U.S. at 28-31, it was recognized that there may well be valid objections to the utilization of a student transportation plan.

The references to the above conclusions regarding the problems inherent in student transportation remedies for segregation are not made in support of an argument that such remedies cannot or should not be utilized by a school board on a voluntary basis or ordered by a court if a constitutional violation has been established. That is not what this case is about. Proposition 1 allows such activity. However, petitioners have chosen to structure their constitutional argument against Proposition 1 on the basis the court ordered transportation of students is the "only" remedy for segregated schools. This is simply not the case. At the most, court ordered student transportation is merely one among "an arsenal of remedies" for segregation as was recognized by the court below. *Crawford v. Board of Education of the City of Los Angeles,* 113 Cal. App. 3d at 652. Further, this remedy is one which runs the risk of being nonproductive or even counterproductive in alleviating the detrimental effects of a segregated education and also one which threatens the process of desegregation itself. Accordingly, even were petitioners correct in their argument that the only effective desegregation remedy could not constitutionally be removed, this argument would have no effect on the constitutional validity of Proposition 1 because involuntary busing is not an effective remedy for *de facto* segregation.

III

LOCAL SCHOOL BOARDS ARE THE PROPER BODIES TO DEAL WITH DE FACTO SEGREGATION

Proposition 1 properly places the burden of addressing the problem of *de facto* segregation declaring:

> "Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan." Cal. Const. art. I, § 7(a).

Even in cases of *de jure* segregation, this Court has noted the complexities of desegregation require the expertise available only at the local level.

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems." *Brown v. Board of Education* (*Brown II*), 349 U.S. 294, 299 (1955).

The existence of these varied local problems is the precise reason that courts should not be quick to take on the role of superintendents of public instruction.

This principle was reemphasized in *Dayton I*:

> "But our cases have just as firmly recognized that local autonomy of school districts is a vital national tradition. (Citations omitted.) It is for this reason that the case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles." 433 U.S. at 410.

In *Austin Independent School District v. United States*, 429 U.S. 990 (1976), this Court vacated the judgment ordering a systemwide remedy of another court of appeals and remanded in light of *Washington v. Davis*. In a concurring opinion, Mr. Justice Powell noted that the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified. Justice Powell also pointed out that Austin, as is the case with Los Angeles and most larger cities, suffers from residential segregation which creates significant problems for school officials seeking to achieve a nonsegregated school district. As Justice Powell

observes, such residential patterns are typically beyond the control of school authorities and are more a function of economic pressures and voluntary preferences.

In Los Angeles, the school board is faced with much the same problems as are the boards of any multi-racial, growing city. It faces the need to select and purchase sites for construction; develop curriculum programs which will provide the best education possible; hire staff and administrative personnel; and accomplish these duties within a framework of limited budgets and rising costs. The board must also consider these factors in light of neighborhood school policies and in accordance with the varied interests of the parents and citizens of the city. Proposition 1 properly places the responsibility for implementing voluntary school integration plans, where no *de jure* segregation exists, with the political body most closely responsible to the public, the school board. Cal. Const. art. I, § 7(a).

IV

EQUAL ACCESS TO SCHOOLS REMEDIES MUST BE SENSITIVE TO THE INTERESTS OF CHILDREN AND PARENTS

It is significant that in stating the purpose of Proposition 1, the Legislature and people of California declared the amendment to be necessary to serve the compelling state interest in, among other things, maximizing the educational opportunities and protecting the health and safety of all public school pupils and enhancing the ability of parents to participate in the educational process. Cal. Const. art. I, § 7(a).

Mr. Justice Brennan, in his concurring opinion in *Dayton I*, 433 U.S. at 424, noted that a court

> "should be flexible but unflinching in its use of its equitable powers, always conscious that it is the rights

> of individual schoolchildren that are at stake, and that it is the constitutional right to equal treatment for all races that is being protected."

This passage points out an important and often forgotten element of school desegregation cases—the human element. Too many times courts impose remedies calling for racial balance in the schools based upon the percentages of the population in the area, forgetting that behind each of the numbers stands a school age child.

In *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), this Court declared that because local autonomy is perceived to be essential both to the maintenance of community concern and support for the public schools and to the quality of the educational process, no single tradition in public education is more deeply rooted than local control over school operations. Justice Powell, concurring in *Austin, supra*, n.7, declared that a court has the duty, in fashioning a desegregation remedy, to balance the individual and collective interests. The individual interests, as personal and important as any in our society, relate to the family and to the concern of parents for the welfare and education of their children. Families share these interests wholly without regard to race. As Justice Powell concludes, these factors should be considered in imposing a desegregation remedy the burden of which falls not upon the officials responsible for the offending action, but rather upon innocent children. *Id.*

Many factors contribute to the educational development of the nation's youth. Of these, the school plant and its teaching staff are only one element. Other factors which must be given due consideration are the importance of the parents' place in education, parental involvement in the schools through room mother and parent-teacher programs,

opportunities for extra curricular activities, adequate nutrition, and adequate exercise and rest. These factors, to a large part, are best served by a neighborhood school policy such as that adopted by the Legislature and people of California in Proposition 1. Consider, for example, the problems a parent might have in attending a parent-teacher association meeting at his child's school which is located many miles from his home. In an area such as Los Angeles, where some children are bused to schools 20 miles from home, this important part of child educational development may be totally lacking. Sending children to school many miles from their homes also places an extra burden upon parents who would like to assist in daytime school activities. Parents of modest income may be altogether precluded from helping in the classroom simply because they cannot afford the costs of transportation. Taking children out of their neighborhood schools may also diminish their opportunity to participate in extracurricular activities. Where athletics, music, or other such activities are conducted outside of regular school hours, the child who has to ride the bus may be precluded from participating. Finally, great weight must be given to the physical effects of long distance transportation on the children themselves. It is simply not equitable to extend the school day of elementary school children by many hours, in some instances, in order to comply with harsh, systemwide transportation schemes. These are the factors referenced by Proposition 1's specified purpose of maximizing students' educational opportunities, protecting their health and safety, and enhancing the ability of parents to participate in the educational process. Cal. Const. art. I, § 7(a). Because involuntary busing impinges on these compelling state interests, it is not justifiable except in those cases where indispensable to remedy specific constitutional violations.

CONCLUSION

The California Constitution, as amended by Proposition 1, gives to minority youngsters faced with alleged educational segregation all the rights and remedies guaranteed by the Federal Constitution. It also gives to them all the rights which California courts had previously found to exist under the California Constitution. The only limitation it makes is in the *remedies* a California court may now order if only unintentional (*de facto*) segregation is found to exist in a school district. In this situation, at present, a state court may not order student assignment or transportation, although other remedies may be mandated.

It is true that under California case law construing the state constitution prior to Proposition 1, the remedies for *de facto* segregation were not so circumscribed. However, this limitation does not render Proposition 1 unconstitutional since federal law does not mandate the imposition of any remedies whatsoever for *de facto* segregation. Further, it is questionable whether such limitation is, in actuality, a limitation to achieving the goals of desegregation inasmuch as student school assignment and transportation have not been shown to be truly effective remedies for the ills of a segregated school system.

Proposition 1 strikes a reasonable and proper balance between effective remedies for *de facto* desegregation and a consideration of the physical and emotional hardships caused by involuntary busing.

January, 1982

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-38

MARGARET ELLEN CRAWFORD, a minor, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to
The California Court of Appeal
Second Appellate District

BRIEF OF *AMICUS CURIAE* PALO ALTO UNIFIED SCHOOL DISTRICT IN SUPPORT OF RESPONDENT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. 81-38

MARGARET ELLEN CRAWFORD, a minor, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to
The California Court of Appeal
Second Appellate District

BRIEF OF *AMICUS CURIAE* PALO ALTO UNIFIED SCHOOL DISTRICT IN SUPPORT OF RESPONDENT BOARD OF EDUCATION OF THE CITY OF LOS ANGELES

I.

INTEREST OF *AMICUS CURIAE*

Palo Alto Unified School District ("Palo Alto"), appearing as *amicus curiae* with the consent of the parties, is one of the defendants in *Tinsley* v. *Palo Alto Unified School District,* 1 Civil 50997, currently pending in the California Court of Appeal for the First Appellate District. The central issue in

Tinsley, as here, is whether Proposition 1 violates the equal protection clause of the 14th Amendment. Oral argument and further proceedings in *Tinsley* have been stayed pending this Court's decision here.

While the legal issue presented in *Tinsley* is identical to the primary legal issue here, the factual context is wholly different. In *Tinsley*, the defendants are nine different elementary school districts, selected by plaintiffs, that are spread over the two counties that make up the Peninsula area. Plaintiffs assert that those school districts have violated the equal protection clause of the California constitution because they have different racial mixes of students when compared with each other. Importantly, there is no claim of *de jure* segregation. Indeed, the petition in *Tinsley* expressly disclaims that any act of any school district or other defendant contributed to or in any way caused the alleged racial imbalance. Thus, *Tinsley* presents the question of whether Proposition 1 violates the 14th Amendment in the context of an *inter*-district, *inter*-county, admittedly *de facto* case.

The California Court of Appeal and the parties in *Tinsley* agree that this Court's decision in this case and in *Seattle School District No. 1* v. *State of Washington*, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part*, 633, F.2d 1338 (9th Cir. 1980), *prob. jur. noted*, 50 U.S.L.W. 3278 (No. 81-9, Oct. 13, 1981) will be highly relevant, if not dispositive, authority in deciding *Tinsley*. As such, Palo Alto has a significant interest in the outcome of this case.

II.
SUMMARY OF ARGUMENT

Proposition 1 was passed by the people of California to repeal a judicially-created extension of state constitutional law beyond the parameters of the 14th Amendment. The effect of Proposition 1 was to conform state law to the 14th Amendment. Both logic and precedent compel the conclusion that such action cannot itself violate the 14th Amendment.

In 1976, the California Supreme Court in *Crawford* v. *Board of Education*, 17 Cal.3d 280, 551 P.2d 28, 130 Cal. Rptr. 725 (1976), held, in the context of an *intra*-district desegregation case, that the California constitution required courts to remedy statistical racial imbalance in schools regardless of the absence of any prior intentional discrimination on the part of the school district. In *Tinsley* v. *Palo Alto Unified School District*, 91 Cal.App.3d 871, 154 Cal. Rptr. 591 (1st Dist. 1979), the California Court of Appeal extended *Crawford* to require adjoining school districts to remedy *inter*-district statistical racial imbalance. In November 1979, the people of California repealed those decisions by passing Proposition 1, conforming the state constitution to the 14th Amendment.

Petitioners here and in *Tinsley* argue that the repeal of the *Crawford-Tinsley* cases itself violates the equal protection clause of the 14th Amendment. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 407, 97 S.Ct. 2766, 53 L.Ed.2d 851 (1977) and its progeny establish that the mere repeal of a state obligation cannot violate the 14th Amendment unless the repealed obligation was originally compelled by the 14th Amendment.

III.

ARGUMENT

1. Proposition 1 Merely Repeals The *Crawford-Tinsley* Line of Cases.

Proposition 1 repeals the judicially-created California constitutional obligation of school districts to eliminate statistical racial imbalance, an obligation imposed even in the absence of a finding of intentional discrimination. It does so by using language that conforms the *obligations* of school districts under the California equal protection clause to the *obligations* with respect to pupil assignment and pupil transportation imposed by the 14th Amendment. That Proposition 1 was intended to repeal the independent state constitutional duty is shown most clearly by the legal background of its enactment.

Early federal school desegregation cases established the unconstitutionality of officially-sanctioned dual schools. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873 (1954). In the 1960s, the federal courts expanded that prohibition of dual school systems into a federal duty to integrate in a large number of circumstances. *E.g., Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964). That expansion was limited in 1971 in *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), where this Court held that the 14th Amendment required no particular degree of racial mix and that, absent a federal constitutional violation, a federal court has no authority to assign students to schools on the basis of race.

Two years later, in *Keyes* v. *School District No. 1,* 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Court held that to establish a violation of the 14th Amendment, plaintiffs must prove that the school district intentionally or purposefully brought about or maintained a segregated school system. Thus, the court in *Keyes* solidified the distinction between *de jure* (intentional or purposeful) segregation and *de facto* (statistical racial imbalance) segregation. *Keyes* v. *School District No.1, supra,* 413 U.S. at 209. *See, e.g., Washington* v. *Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 91 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Columbus Board of Education* v. *Penick,* 443 U.S. 499, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979). Finally, in *Milliken* v. *Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), an inter-district case, this Court held that federal courts cannot impose desegregation remedies exceeding the scope of the federal constitutional violation involved.

Coincident with federal developments, California courts were interpreting the language of the California constitution. The California courts began to diverge from federal law in *Jackson* v. *Pasadena City School District,* 59 Cal.2d 876, 382 P.2d 878, 31 Cal. Rptr. 606 (1963), where the court recognized a state duty to alleviate racial imbalance regardless of cause. Subsequently, in *Crawford* v. *Board of Education, supra,* decided after *Keyes,* the court held that school boards had a state

constitutional duty to take reasonably feasible steps to remedy racial imbalance between schools in the same school district, regardless of the cause of the imbalance. This ruling, based upon the equal protection clause of the California constitution, was an express departure from federal equal protection law. Subsequently, the California Court of Appeal in *Tinsley* extended *Crawford* by holding that the California constitution obligated school districts to remedy *inter*-district racial imbalance, even in the absence of a showing of any intentional segregation.

The *Tinsley* extension of California law separated California law from federal law in two ways. First, applying *Crawford, Tinsley* held that no intentional conduct on the part of school districts is necessary to trigger judicial imposition. Second, unlike *Crawford, Tinsley* authorized courts to create school attendance plans that cross both district and county lines, even though no racial imbalance exists within a given school district.

Proposition 1 was enacted by the people in 1979 to repeal the judicial holdings in *Crawford* and *Tinsley*. That repeal was the narrow purpose of Proposition 1.

The fact that Proposition 1 is a repeal and no more is confirmed by what it does *not* do. Proposition 1 has no impact on situations where *de jure* segregation does, or might, exist. It does not purport to impede or prevent a state or federal court from finding *de jure* segregation and ordering a school district to remedy that violation.

Proposition 1 does not prevent school districts or other state educational officials from undertaking voluntarily programs or policies to promote racial balance. It expressly preserves that right for school districts. Nor does Proposition 1 prevent the state legislature or any city or county government from enacting legislation requiring school districts to eliminate racial imbalance. It speaks only in terms of eliminating a court-created constitutional duty.

Proposition 1 does not affect the political processes of the state. Proposition 1 makes no change in the power of school districts, administrators, the legislature, cities or counties to decide and implement any educational or integration issue.

Petitioners argue that Proposition 1 limits the ability of courts to use two specific remedies, pupil reassignment and pupil transportation, to correct a violation of the state constitutional duty and thus establishes a discriminatory court system that allows courts to remedy fully some wrongs but not others. The argument, raised for the first time in this Court, is without merit. Even if Proposition 1 only eliminates certain remedies, it is still only a repeal of a prior extension of state law not compelled by the federal constitution. The repeal of some but not all of the remedies available to California courts merely means that California law is more extensive than federal law concerning some remedies but not others. Petitioners cannot escape the fact that Proposition 1, by its terms, limits its repeal to the scope of the 14th Amendment.[1]

Plaintiffs in *Tinsley, amici* here, argue that two of the minor provisions of Proposition 1, the modification of prior judgments provision and the calendar preference provision, are positive discriminatory acts and transform Proposition 1 from a repeal to a state act which violates the 14th Amendment. The argument misses the point. The people, by enacting Proposition 1, repealed the *Crawford-Tinsley* extension of the state equal protection clause. These provisions simply implement that repeal.

In sum, the language of Proposition 1 and the legal background of its enactment show that it is nothing more than a repeal of a prior, judicially-created state constitutional duty. It repeals that duty only to the extent that it goes beyond the requirements of the 14th Amendment. As shown below,

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[1] Petitioners also misconstrue the effect of Proposition 1. As shown earlier, Proposition 1 eliminates the underlying state constitutional duty, not merely some of the remedies. It specificially speaks of eliminating the "obligations or responsibilities which exceed those imposed by the equal protection clause of the 14th Amendment. . . ."

Petitioners' argument that the decision of the California Court of Appeal below authoritatively construes the effect of Proposition 1 misstates California law. The decision of the Second Appellate District is not in any way binding or controlling authority on other California appellate courts who may be called upon to interpret Proposition 1. 6 Witkin, Calif. Proc. § 667 at 4580 (2d ed. 1971)(and the multitude of cases cited therein). Thus, the First Appellate District, before which *Tinsley* is pending, may well conclude that Proposition 1 does, in fact, repeal the underlying duty.

conforming state obligations to the requirements of the 14th Amendment cannot, indeed logically could not, violate the 14th Amendment.

2. The Repeal Of A State Law Not Compelled By The 14th Amendment Cannot Itself Violate The 14th Amendment.

A. *Dayton* And Other Cases Establish That A Mere Repeal Cannot Violate The 14th Amendment.

The constitutional difference between a repeal and broader state actions, established in *Dayton,* authorizes the repeal of a prior state act if that prior act itself was not compelled by a federal constitutional duty. This Court foreshadowed that analysis by reserving the repeal question as early as 1967. In *Reitman* v. *Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), the Court pointed out that the effect of the California proposition in that case was much broader than a mere repeal. It stated: "The California court could very reasonably conclude that Section 26 could, and did have, wider impact than a mere repeal of existing statutes . . . The section struck more deeply and more widely." *Reitman* v. *Mulkey, supra,* 387 U.S. at 376-77.

Two years later, in *Hunter* v. *Erickson,* 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), this Court expressly reserved the repeal question:

> By adding § 137 to its Charter the City of Akron, which unquestionably wields state power, not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect.[5]
>
> [5] Thus we do not hold that mere repeal of an existing ordinance violates the Fourteenth Amendment.

Hunter v. *Erickson, supra,* 393 U.S. at 389-90.

When this Court reached the question of whether the repeal of a state obligation not compelled by the federal constitution could violate the 14th Amendment, it concluded that it could not. In *Dayton,* the Court considered the

constitutionality of a school board's repeal of an earlier resolution committing the board to the goal of racial balance. This Court approvingly quoted the following language from the opinion of the Sixth Circuit:

> The question of whether a rescission of previous board action is in and of itself a violation of appellant's [federal] constitutional rights is inextricably bound up with the question of whether the board is under a [federal] constitutional duty to take the action which it initially took. [Citations omitted.] *If the board was not under such a duty then the rescission of the initial action in and of itself cannot be a [federal] constitutional violation.* If the board was under such a duty, then the rescission becomes a part of the cumulative violation. . . .

Dayton, supra, 433 U.S. at 415, quoting *Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974) (emphasis added).[2] The principle that the constitutionality of a rescission turns on whether the original act was constitutionally compelled was reaffirmed in *Dayton Board of Education* v. *Brickman,* 443 U.S. 526 99 S.Ct. 2971, 61 L.Fed. 2d 720 (1979), where the Court said:

> . . . [R]escission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment.

Dayton, supra, 443 U.S. at 531 fn. 5.

Thus, whether a repeal of state law is a violation of the federal constitution is a question of whether the repealed state action was federally compelled in the first instance. Here, as petitioners concede, the duty imposed by the *Crawford-Tinsley* line of cases was clearly not federally compelled, and thus the repeal of that duty cannot violate the 14th Amendment.

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[2] The *Tinsley* plaintiffs attempt to distinguish *Dayton* from this case by pointing to language in *Dayton* which shows that the school board had not yet implemented the plan at the time of repeal. This attempt is misplaced for two reasons. First, they offer no theory that gives any constitutional significance to this distinction. Second, subsequent cases read the implementation language in *Dayton* as dictum and approve a repeal even though the prior law has been implemented. *See Associated General Contractors of California* v. *San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980); *Crawford* v. *Board of Education,* 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (2d Dist. 1980).

Indeed, Proposition 1 expressly embraces the duties and obligations imposed by the 14th Amendment.

The *Dayton* principle has been reaffirmed in many contexts. In *United States* v. *School District of Ferndale, Michigan,* 460 F. Supp. 352 (E.D. Mich. 1978), for example, the court dealt with a school district's failure to eliminate traditional classrooms after a finding by the Department of Health, Education and Welfare ("HEW") that those classrooms contributed to *de jure* segregation. The court, in overturning the finding of *de jure* segregation by the HEW hearing examiner, noted:

> Plaintiff appears to urge that School District's failure to eliminate the traditional classrooms after the HEW hearing and the decision of HEW that School District had been guilty of *de jure* segregation is itself a constitutional violation. This would be so only if School District were under a constitutional duty to desegregate [citing *Dayton*].

United States v. *School District of Ferndale Michigan, supra,* 460 F. Supp. at 377.

Brown v. *Califano,* 627 F.2d 1221 (D.C. Cir. 1980), adopts the same position. Faced with an attack on the 1974 Equal Educational Opportunities Act, which repealed prior HEW guidelines broader than the 14th Amendment, the court held that the act of repealing the guidelines did not violate the 14th Amendment because it did not impair any constitutional duty.

The Ninth Circuit recently acknowledged this rule in *Associated General Contractors of California* v. *San Francisco Unified School District,* 616 F.2d 1381 (9th Cir. 1980). At issue there was the constitutionality of a recently-enacted state law that repealed a school board affirmative action policy that was broader than the 14th Amendment. The court held that the state law was not unconstitutional, even though it repealed the board's affirmative action policy, because the board had no prior federal constitutional duty to enact the policy. The Ninth Circuit stated:

> Appellants argue further that once a program is proven in practice to dispel discrimination, it is unconstitutional to withdraw from it. By this logic, even if the Board was not initially compelled by the Constitution to adopt its affirmative action policy, it is now compelled to continue it.
>
> Apparently, the Supreme Court's position is that it is a constitutional violation for a school board to rescind previous action if and only if the board is under a constitutional duty to take that action initially. *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 414, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977). Because we hold that the Board had no constitutional duty to adopt its affirmative action policy, the Constitution does not forbid the Board to return to its former race-neutral policy.

Associated General Contractors of California v. *San Francisco Unified School District, supra,* 616 F.2d at 1389.

Finally, Mr. Justice Rehnquist noted this principle in the context of Proposition 1 itself. Sitting as Circuit Justice in *Board of Education of Los Angeles* v. *Superior Court,* 448 U.S. 1343, 101 S.Ct. 21, 65 L.Ed.2d 1166 (1980), and quoting from the trial court in *Tinsley,* he stated:

> I find myself unable to articulate the point better than Judge Cohn of the Superior Court of San Mateo County in *Tinsley* v. *Palo Alto Unified School District, No. 206010* (July 10, 1980):
>
> > 'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.'

Board of Education of Los Angeles v. *Superior Court, supra,* 101 S.Ct. at 22-23.

This line of federal authority establishes that a mere repeal of a state act not previously compelled by the 14th Amendment cannot violate the 14th Amendment. The application of that principle here, we submit, is simple. Proposition 1 repeals the *Crawford-Tinsley* line of cases and as such it does not violate the 14th Amendment.

B. No Case Holds That The Mere Repeal Of A State Law Can Violate The 14th Amendment.

No case relied upon by petitioners holds that a governmental action which merely conforms state law to the 14th Amendment is, in fact, a violation of the 14th Amendment. Each case cited that is even arguably relevant here involves some state action that promotes *de jure* segregation, skews the political processes of the community, or prevents school districts from dealing voluntarily with statistical racial imbalance.

For example, in *Hunter*, the Court (while expressly reserving the repeal question) struck down a city charter amendment that rescinded a fair housing ordinance *and* required future race-related housing ordinances, unlike all other ordinances, to be approved by a majority of the population. The ordinance violated the 14th Amendment because it fundamentally altered the city's political processes by placing a special burden on future attempts of minorities to pass city legislation. *Hunter* v. *Erickson, supra,* 393 U.S. at 389-90.

Hunter is inapplicable here. The political processes of California are not changed by Proposition 1. The people of California, in amending their constitution in the only way open to them, did not affect any existing political structure. The power of school boards and state officials to eliminate racial imbalance remains unchanged. The power of courts to resolve controversies likewise is not changed. Here, unlike *Hunter,* no additional burden forbidden by the 14th Amendment results from Proposition 1.

Petitioners also rely on *Seattle School District* v. *State of Washington,* 473 F.Supp. 996 (W.D. Wash. 1979), *aff'd in part and rev'd in part,* 633 F.2d 1338 (9th Cir. 1980), *prob. jur. noted,* 50 U.S.L.W. 3278 (No. 81-9, Oct. 13, 1981). The *Seattle* case involved a state initiative (Initiative 350) that

specified the instances in which pupil transportation and pupil assignment were permissible and did not provide for pupil assignment and pupil transportation for purposes of racial integration. The district court held the initiative unconstitutional. The Ninth Circuit affirmed, concluding that Initiative 350 was more than the mere repeal of a prior state attempt to remedy racial imbalance and thus was unconstitutional.

Seattle is different from this case in three important respects. First, the Ninth Circuit noted that the repeal of the local school board plan by a statewide initiative altered the fundamental political balance that existed in the state before Initiative 350. In distinguishing *Dayton*, the court noted:

> The state's argument that [*Dayton*] permits official rescission of previously adopted desegregation measures as long as there was no antecedent constitutional duty to remedy *de jure* segregation ignores the crucial fact that a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control. Initiative 350, unlike the situation in *Dayton*, results in the political process being skewed at the expense of the local representative bodies and their constituencies.

Seattle School District v. *State of Washington, supra*, 633 F.2d at 1346. Unlike *Seattle*, Proposition 1 does not skew the political processes of California by which integration policies are formed.

Second, Initiative 350 in the *Seattle* case wholly prohibited the use of pupil assignment and pupil transportation to remedy racial imbalance. Here, on the other hand, the power of school boards to utilize pupil transportation and pupil assignment to remedy racial imbalance is expressly preserved by the proposition itself.

Third, and most importantly, the district court in *Seattle* had held that the passage of Initiative 350 prevented local school boards from remedying what might possibly be *de jure* segregation. Initiative 350 was enacted after the Seattle school district had announced an integration plan in the face of

proceedings by the federal government alleging a *de jure* violation of the 14th Amendment. The district court held that although no judicial finding of *de jure* segregation had been made, Initiative 350's revocation of the Seattle plan interfered with the remedying of what might be a *de jure* violation. Here, Proposition 1 does not interfere with any federal duty. Whatever federal law commands, Proposition 1 permits.

Similarly, *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd,* 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971) relied on by both the district court and the Ninth Circuit in *Seattle,* is also governed by principles that do not apply here. *Lee,* a pre-*Dayton* district court case, involved a state law that prohibited student assignment and student transportation for purposes of racial balance unless approved by a local board of education, a majority of whose members had been elected by the public. Prior to the enactment of the state law at issue in *Lee,* the State Commission of Education could order such remedies.

Lee has the same constitutional defects as *Seattle.* The passage of the state statute involved in *Lee* fundamentally altered the previously existing political structure of the state by revoking the power of the State Commissioner of Education to force local school districts to remedy racial imbalance. Like *Seattle,* local school boards were no longer permitted voluntarily to remedy racial imbalance. Finally, the state statute in *Lee* prevented some local school boards from remedying *de jure* segregation. None of these constitutional defects exists in Proposition 1.

In sum, no case holds that state action similar to Proposition 1 violates the 14th Amendment. To the contrary, all of the cases even arguably contrary involve state acts governed by sound, but nonetheless inapplicable, constitutional concepts. No case cited by appellants alters the basic point that the constitutionality of mere repeals is governed by *Dayton* and its

progeny and that, under those cases, Proposition 1 is constitutional.[3]

C. Strict Scrutiny Analysis Is Inappropriate.

Strict scrutiny is an inappropriate method of analyzing the governmental activity involved here. No case involving a mere repeal has adopted strict scrutiny analysis. As the *Dayton* cases and *Associated Contractors* make clear, whether a mere repeal violates the 14th Amendment turns solely on whether the repealed law was originally compelled by the 14th Amendment.

Appellants' authorities are not to the contrary. Indeed, the circuit opinion in *Seattle* confirms that strict scrutiny analysis is inappropriate where a mere repeal is involved. There the court noted that if the school board had repealed its own plan, the appropriate test for determining the constitutionality of that repeal would be whether the school district was under a pre-existing constitutional duty to eliminate segregation. The court said:

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[3] The *Tinsley* plaintiffs cite an extensive list of other cases for the proposition that repeals can violate the 14th Amendment, *e.g.*, *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed. 2d 256 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed. 2d 110 (1960); *Hadnolt* v. *Amos*, 394 U.S. 348, 89 S.Ct. 1101, 22 L.Ed. 2d 336 (1969); *United States* v. *Board of School Commissioners of Indianapolis*, 513 F.2d 400 (7th Cir. 1978), *cert. den.*, 439 U.S. 824, 99 S.Ct. 93, 58 L.Ed. 2d 116 (1979); and *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 515, 82 S.Ct. 429 (1962), among others. All of these cases involved state acts that created a *de jure* violation of the 14th Amendment. None involves a repeal of state law back to the parameters of the 14th Amendment.

They also cite a number of alien cases, *e.g.*, *Oyama* v. *California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed. 2d 495 (1976); *Matthews* v. *Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976); and voting cases, *e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964); *Lucas* v. *44th General Assembly of Colorado*, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed. 2d 632 (1964), for the proposition that the constitutional standards for federal and state acts are different. Neither line of cases is applicable. In both, there are special considerations for treating federal and state acts differently. No case in the school discrimination area has ever implied that the acts of states should be treated differently than the acts of the federal government.

> Had a successor school board to the one that adopted the Seattle Plan—instead of the state electorate as a whole—attempted to repeal or rescind the self-imposed student assignment plan, we would be faced with a quite different issue.

Seattle School District v. *State of Washington, supra,* 633 F.2d at 1345 n. 8.

The *Seattle* court, after discussing the holding in *Dayton,* concluded that if only a repeal were involved:

> . . . the constitutionality of Initiative 350 would hinge upon the Stage 2 determination of whether the Seattle school district has maintained a dual system or practiced *de jure* segregation.

Seattle School District v. *State of Washington, supra,* 633 F.2d at 1346 n. 8.

Further, repeals such as Proposition 1 do not classify. They merely conform the state constitution to the federal constitution and no two groups of people are being treated differently by the repeal.

More importantly, even if some classificatory scheme can be found in Proposition 1, it does not classify in an invidious way. To the extent that Proposition 1 creates a classification, it is a classification sanctioned by the 14th Amendment. That classification, by definition, cannot be impermissible.

D. The Rule Proferred By Petitioners Will Lead To Undesirable Results.

If, as petitioners argue, the mere repeal of a prior extension of state law beyond the parameters of federal law could violate federal law, undesirable results would follow. First, the prospect of being forever locked into an extension of state law beyond federal law would deter states from enacting legislation to remedy social problems as they perceive them. This deterrence would hamper the growth of state jurisprudence and unnecessarily restrict the flexibility of all levels of government in coping with social problems in the way they deem most appropriate.

Second, adopting petitioners' position would mean, in effect, that the 14th Amendment means something different in each state. If the 14th Amendment is the bar to the repeal of a prior, previously uncompelled extension of state law, it is the 14th Amendment that now compels the continued extension of that state law. That same 14th Amendment, however, would not require that extra step in those states that did not originally extend state law. The result would be that the 14th Amendment would mean one thing in some states and something else in others.

These undersirable results are the logical conclusion of the position taken by petitioners.

IV.

CONCLUSION

The people of the State of California, by enacting Proposition 1, amended their constitution to conform the guarantees of the state equal protection clause to those of the equal protection clause of the 14th Amendment. To assert that this action is itself somehow a violation of the 14th Amendment defies logic and ignores precedent. The decision of the court below should be affirmed.

Dated: February 1, 1982.

Respectfully submitted,

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No. 81-38
IN THE

Supreme Court of the United States

October Term 1981

MARY ELLEN CRAWFORD, etc., *et al.*,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT.

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT.

Interest of Amicus Curiae.

The interest of Alan Robbins in this case is fundamental. Proposed amicus curiae Alan Robbins is a member of the California Senate, representing over 500,000 residents of the San Fernando Valley. He is the author and primary proponent of Proposition 1, which became incorporated in Article I, § 7(a) of the California Constitution.

The undersigned respectfully files the attached brief as amicus curiae. The respective consents of the attorneys for petitioners and respondent to the filing of this brief have been lodged with the Clerk of the Court.

Brief of Amicus Curiae
Senator Alan Robbins.

Commencing in 1977, Senator Robbins led an effort to place this constitutional amendment before the voters of California. In early 1979 Proposition 1 was approved for submission to the electorate by an overwhelming vote of 31 to 5 in the Senate, and 62 to 17 in the State Assembly. The voters of California passed Proposition 1 by a "yes" vote of almost 70%. It received a majority vote in each of our 58 counties and a substantial vote in every racial and ethnic community in the State. It received a majority "yes" vote in 15 of the 17 legislative districts represented in the State legislature by minority members, a delegation that included two Japanese assemblymen, seven Latino legislators, and eight Black members.

Proposition 1, also known as the Robbins Amendment, received this broad support because of a feeling amongst the electorate of California that mandatory busing of school children is a severe and traumatic remedy which should only be applied when required by the Constitution of the United States.

The decision to repeal independent State authorization for mandatory busing was not made in haste. It came about after substantial experience with mandatory student reassignment showed that it was counter-productive to our goal of harmonious race relations and counter-productive to the achievement of student integration.

The author of Proposition 1 is a Democract, a 20-year supporter of Rev. Martin Luther King, the elected representative of a district where half of the school children are members of minority groups, and a strong committed advocate of achieving integration through open housing in the community and through school attendance boundary ad-

justments, voluntary pupil transfers, and magnet programs in our schools.

Because of the extreme hardship of mandatory reassignments and its cost in human and material terms, the author of Proposition 1 and its 55 legislative co-authors came to the conclusion that the best interests of the students would be served if California conformed its constitutional provision on this subject to that of the Federal government. The overwhelming majority of the voters in this State affirmed that decision, and the appellate courts of California upheld its constitutionality.

By allowing California to proceed on its own course towards meaningful school integration, and by allowing our State to do this in full and complete compliance with the United States Constitution, this court will be giving us the opportunity to achieve major steps in the area of integration as a model for other states and cities across the nation.

The undersigned amicus curiae supports the argument made in the brief filed by counsel for respondent Los Angeles Unified School District.

Dated: January 29, 1982.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici Margaret Tinsley et al. are parents of school children residing within several elementary school districts in a 12-mile diameter area south of San Francisco, California, who filed a state court action in 1976 seeking relief from de facto school segregation (Tinsley v Palo Alto Unified School District, et al.), now pending in the California Court of Appeal, First District (No. 1 Civ. 50997) and stayed by that Court until this Court's disposition of Crawford. Tinsley also involves the constitutionality of Proposition 1. The basic facts of Amici's case may be found in the opinion on an earlier appeal (1979) 91 Cal.App.3d 871, 154 Cal. Rptr 591. Tinsley is further described in Argument II.

SUMMARY OF THE ARGUMENT

I. Proposition 1 stigmatizes minority children and their parents, in violation

of the central purpose of the 14th Amendment (Strauder v West Virginia (1880) 100 U.S. 303, 25 L.Ed. 664), by declaring that desegregation must stop and resegregation must occur to preserve racial "harmony and tranquility" in public schools, meaning that school desegregation causes racial strife and turmoil in such schools. This language necessarily will be understood by minority children (and their parents) to mean they cause such strife and turmoil, an impermissible "overbroad generalization . . . which demean[s] the ability or social status of" minority children (cf., Michael M. v Superior Court (1981) 450 U.S. 464, 101 S. Ct. 1200, 1204) and "risk[s] . . . reinforcing" racial "stereotypes" (cf., Orr v Orr (1979) 440 U.S. 268, 283, 99 S. Ct. 1102, 1113-1114), in a manner deeply offensive to the 13th and 14th Amendments--the very purpose of which was to prevent states from stigmatizing whole racial groups as

unfit for civil society.

II. Proposition 1's real objective is perpetuation of school segregation for its own sake. It relieves school boards of any duty to "assign" pupils, let alone bus them short distances, even where students can safely walk, or bicycle (as in Amici's case) to a nearby school, and thus where the supposed "compelling public interests" cannot justify the law.

III. Proposition 1's purported "incorporation" of the 14th Amendment's de facto-de jure classification does not validate that classification in its state law setting. Proposition 1 is inconsistent in purpose and effect with the 14th Amendment because it fails to prevent resegregation of minority students already desegregated under a preexisting plan, and otherwise encourages perpetuation of both de facto and de jure segregation. (See also I and II.)

ARGUMENT

I. Proposition 1, on its face, violates the Thirteenth and Fourteenth Amendments because its very language stigmatizes minority children and minorities generally.

Proposition 1, in its last ¶, states:

> In amending this subdivision [i.e., § 7(a) of Art. I, Calif. Const.], the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of . . . preserving harmony and tranquility in this state and its public schools. . . . (Emphasis added)

Proposition 1, on its face, further declares that to preserve harmony and tranquility it is "necessary" to reopen final desegregation judgments in order to resegregate pupils already desegregated under state court order. (Proposition 1, § 2, as read together with the compelling interests in ¶ 5.)

The court below relied upon five of the seven "compelling public interests"

(113 Cal.App.3d at 654-655, 170 Cal.Rptr. at 509), but studiously refrained from even mentioning the "harmony-tranquility" reason.[1] This omission fairly can be taken as an implied concession that such a reason will not support the Proposition, and is not a legally permissible reason. That is surely correct, but the defect in the "harmony-tranquility" clause goes far beyond that.

A. The language of the harmony-tranquility clause itself, and when read with the language of the reopening of judgments clause, stigmatizes minority children and minorities generally.[2]

1. A century ago this Court held that racially stigmatizing laws were the principal target of the Fourteenth

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[1]The court also omitted mention of the last listed "compelling" interest--"protecting the environment."

[2]This Argument may not be within the scope of the second "Question Presented" on which certiorari was granted. The same is true of some of the following Arguments in II and III, infra. Some of

(Footnote is continued on the next page.)

Amendment, and that the main purpose of the Amendment must be kept "steadily in view"--to protect "those who had long been regarded as an inferior and subject race" against "unfriendly legislative action in the states" by providing them with "exemption from . . . legal discriminations, implying inferiority in civil society." The Court held that a statute limiting jury services to whites was "practically a brand upon" blacks "affixed by the law" and "an assertion of their inferiority. . . ." Strauder v. West Virginia (1880) 100 U.S. 303, 308

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them may not be raised by petitioners Crawford et al. Amici realize that the Court therefore may ignore these arguments if it so desires. United Parcel v. Mitchell (1981)--U.S.--, 101 S. Ct. 1559 at 1562 n. 2; Bell v. Wolfish (1979) 441 U.S. 520, 532 n. 13, 99 S. Ct. 1861 at 1870 n. 13.

However, Amici raise constitutional issues which are narrower than the first two Questions upon which the writ was granted, and this Court may prefer to decide the case on these narrow grounds. (Amici do not address Question No. 3.)

25 L.Ed. 664, 666. Just two terms ago this Court emphatically reaffirmed the broad meaning of Strauder. Rose v. Mitchell (1979) 443 U.S. 545, at 555, 99 S. Ct. 2993, at 2999-3001.[3]

2. The "harmony-tranquility" clause refers not only to preserving harmony and tranquility "in this state" but also more specifically, "in . . . its public schools." Of course, the language refers to racial harmony and racial tranquility and means that its opposite is occurring

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[3]In Rose the Court said:

> It is clear from the earliest cases applying the Equal Protection Clase in the context of racial discrimination in the selection of a grand jury, that the Court from the first was concerned with the broad aspects of racial discrimination that the Equal Protection Clause was designed to eradicate, and with the fundamental social values the Fourteenth Amendment was adopted to protect, even though it addressed the issue in the context of reviewing an individual criminal conviction. (Emphasis added)

in desegregated schools. (See, e.g., Ballot Pamphlet, "Argument in favor of Proposition 1," by State Senator Robbins, author of Proposition 1 in the Legislature, referring to "racial tension and strife" as "counterproductive to our goal of maximum racial harmony").[4] This means that public schools are disrupted by

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[4]The Court below totally ignored the Ballot Pamphlet, which under long-settled California Law is considered the "legislative history" of constitutional amendments and a proper source of their intent and meaning. E.g., Fujii v. California (1952) 38 Cal.2d 718, 242 Pac.2d 617 (invalidating Alien Land law as in truth a racial classification, and resorting to the ballot pamphlet to show "the real purpose of the law"; Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 864-866, 167 Cal.Rptr. 820, 825-826; Amador Valley v. State Board (1978) 22 Cal.3d 208, 149 Cal.Rptr. 239; White v. Davis (1975) 13 Cal.3d 757, 120 Cal.Rptr. 94, 105-106; Carter v. Seaboard Finance (1949) 33 Cal.2d 564, 203 Pac. 2d 758, 769; In Re Quinn (1973) 35 Cal.App.3d 473, 110 Cal.Rptr. 882, 887.

The failure of the Court below to examine this legislative history to determine the effect and intent of Proposition 1 also violates Arlington Heights v. Metro Housing Corp. (1977) 429 U.S. 252, 97 S. Ct. 555, 565.

desegregation, and a common sense[5] inference is that minority children disrupt education when they transfer to formerly "white" schools. And ¶ 2 of Proposition 1 means that disruption is so serious that it is "necessary" to resegregate students already desegregated.

The only other possible interpretation of this language is that whenever there is desegregation, there is racial disharmony caused by children of both races. But, even if the words could be read to chastise all races "equally",[6]

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[5]California constitutional amendments must be given a "practical, common-sense construction." Amador Valley Jt. Un. H.S. Dist. v. State Board (1978) 22 Cal.3d 208, 245, 149 Cal.Rptr. 239, 257.

[6]If there are any other conceivable meanings, this Court should not assume it will be construed more narrowly by California courts. Such construction in no way could obviate the meaning minorities are bound to attribute to the language. Whatever scope of review may be applicable to other parts of Proposition 1 (see infra, pp. 22-33, 55), it seems beyond dispute that any statutory language

minority children, their parents, and other members of minority groups nonetheless will read this language to mean that they are responsible for racial strife and turmoil in the schools. Majority children and their parents are quite unlikely to understand it as describing them, and even if they do, it does not stigmatize them as a group with a badge of incivility and inferiority as it does minority group members. CF. e.g., Hunter v. Erickson (1969) 393 U.S. 385, 89 S. Ct. 557; Loving v. Virginia (1967) 388 U.S. 1, 87 S. Ct. 1817.

3. The language of Proposition 1 thus stigmatizes all minority children for the alleged misconduct of a few.

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that appears to stigmatize minorities should be subject to "strict scrutiny." And the rules applicable to First Amendment cases should apply here. (CF. Harlan, J., concurring in McLaughlin v. Florida (1964) 379 U.S. 184, 197, 85 S. Ct. 283, 291.) See NAACP v. Button (1963) 371 U.S. 415, 83 S. Ct. 328, at 337, 338, 339, 340; Baggett v. Bullitt (1964) 377 U.S. 360, 84 S. Ct. 1316, quoted infra at 55-56.

This Court in other contexts has condemned "overbroad generalizations . . . which demean the ability or social status of the affected class" (Michael M. v. Superior Court (1981) 450 U.S. 464, 468, 101 S. Ct. 1200, at 1204 (plurality) (sex discrimination)); rejected claims that "public safety" justifies state actions reflecting generalizations about misconduct by certain whole groups (Village of Schaumberg v. Citizens (1980) 440 U.S. 620, at 637-638, 100 S. Ct. 826, at 836-837; cf., United States v. Clark (1980) 445 U.S. 23, 100 S. Ct. 895, at 901); and invalidated classifications that "risk . . . reinforcing . . . stereotypes." (Orr v. Orr (1979) 440 U.S. 268, 283, 99 S. Ct. 1102, 1113-1114). Thus, even if a few minority children are responsible for racial strife and turmoil in California schools (as are some "majority" children), the generalization made in Proposition 1 is deeply offensive to the Thirteenth and Fourteenth Amendments--the very purpose of which was to

prevent states from categorizing an entire class of people as unfit for civil society because of their race.[7]

4. Put another way, the language of Proposition 1 must be read in its historical context. City of Newport v. Fact Concerts, Inc. (1981)--U.S.--, 101 S. Ct. 2748, at 2755 (post-Civil War enactments not to be considered in an "historical vacuum").[8] The historical context--and a major reason why minorities will understand this clause

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[7]The "harmony" language also reflects another sweeping generalization--that all desegregation leads to serious racial strife. This is nonsense, as this Court knows. See Dayton Board of Education v. Brinkman (1977) 433 U.S. 406 at 421, 97 S. Ct. 2766 at 2776.

[8]School segregation is a legacy of slavery. See the opinion of the Court by Harlan, J., in South Carolina v. Katzenbach (1966) 383 U.S. 301, 311, n. 10, 86 S. Ct. 803, 809 n. 10; Brunson v. Board of Trustees (4th Cir. 1970) 429 F.2d 820, 825 (Sobeloff, J., concurring); United States v. School Commissioners of Indianapolis (7th Cir. 1974) 503 F.2d 68, 85 ("no less than a return to the spirit of Dred Scott").

as stigmatizing them--is that the need for racial peace and harmony has been given as the justification for every other retrogressive racial action throughout the history of this country, all stigmatizing minorities. This is the language of Dred Scott,[9] where the Court "interpreted" the term "citizen" in the Diversity Clause to exclude all blacks (slave or free, North and South) and their descendants forever, because otherwise blacks as "citizens" free to move as such through any state "would be dangerous to the peace and safety" of the slave states, be exempt from the slave codes which those states "deemed . . . absolutely essential to [their] own safety," and would produce "discontent and insubordination" among the slaves

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[9]Dred Scott v. Sanford (1857) 60 U.S. (19 How.) 393, 15 L.Ed. 691.

therein. (60 U.S. (19 How.) at 418, 425, 15 L.Ed. at 706, 709) It is literally the language of Justice Wayne, concurring in Dred Scott (Id., 60 U.S. (19 How.) at 455, 15 L.Ed. at 721):

> The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them now. . . (emphasis added).

Without intending to exaggerate, the language of Proposition 1 appears to be, in "a form more subtle than before [b]ut . . . not less real or pernicious" (Rose v. Mitchell (1979) 443 U.S. 545, at 558, 99 S. Ct. 2993, at 3001)[10] a modern-day affirmation of Dred

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[10]"[W]e also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more sutble than before. But it is not less real or pernicious."

Scott's dictum that blacks are "altogether unfit to associate with the white race."[11]

The harmony clause and the "resegregation clause" together also revive the principle of Plessy v. Ferguson ((1896) 163 U.S. 537, 16 S. Ct. 1138, which justified state laws enforcing racial segregation because "the state

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[11]Scott v. Sanford, supra. Chief Justice Taney said, in the majority opinion, that blacks were separated from whites by "indelible marks," that "the stigma, of the deepest degradation, was fixed upon the whole race," that even in the North "the strongest mark of inferiority and degradation were fastened upon" them, and that a whole class of human beings was "thus stigmatized." He also said that blacks, free or slave, North and South, ". . . had for more than a century before [the Constitution] been regarded as beings of an inferior order; and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect. . . . [A] perpetual and impassable barrier was intended to be erected between the white race and the one they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they looked upon as . . . far below them in the scale of created beings. . . . And no distinction in this respect was made between the free negro or mulatto and the slave, but the stigma, of the deepest degradation, was fixed upon the whole race."

legislature is at liberty to act . . . with a view to the . . . preservation of public peace and good order." It is the language used to justify enforced neighborhood segregation in Buchanan v. Warley (1917) 245 U.S. 60, 38 S. Ct. 16; and in more recent times to justify continued racial segregation in public schools, recreational facilities, and housing. Brown v. Board of Education (II) (1955) 349 U.S. at 294, 75 S. Ct. 753; Cooper v. Aaron (1958) 358 U.S. 1, 78 S. Ct. 1401, at 1409; Watson v. Memphis (1963) 373 U.S. 526, 83 S. Ct. 1314, 1320. See United States v. Board of Sch. Comm'rs of Indianapolis (7th Cir. 1974) 503 F.2d 68, 84, cert. denied 421 U.S. 929, 95 S. Ct. 1655 (affirming trial court's exclusion of evidence offered to prove that "busing for purposes of integration did not lead to . . . interracial harmony"); Hunter v. Erickson, supra, 393 U.S. 385,

at 392, 89 S. Ct. 557, at 561. It is the language used to justify deprivation of the rights of minorities to peaceably assemble and speak against racial segregation. E.g., Cox v. Louisiana (1964) 379 U.S. 536, 85 S. Ct. 453, at 462; Edwards v. South Carolina (1963) 372 U.S. 229, 83 S. Ct. 680; CF. NAACP v. Alabama (1964) 377 U.S. 310, 84 S. Ct. 1302, 1315.

In light of history, three justices of this Court plainly were correct in principle in saying (City of Memphis v. Greene (1981)--U.S.--, 101 S. Ct. 1584, at 1604):

> The stated explanation for the closing [of a street] is of a sort all too familiar: 'protecting the safety and tranquility of a residential neighborhood' by preventing 'undesirable traffic' from entering it. Too often in our Nation's history statements such as these have been little more than code phrases for racial discrimination . . . .

(Marshall, Brennan and Blackman, JJ, dissenting).[12]

5. In Plessy, eight members of the Court opined that the Louisiana railroad segregation law did "not necessarily imply the inferiority of either race to the other," and that:

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races [by statute] stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it . . . .

To eliminate the vestiges of Plessy, expressions like that in Proposition 1 must be viewed (insofar as possible) through the eyes of minorities--as this Court had no trouble doing in Strauder v. West Virginia, --and, from that perspective, language

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[12]The majority also indicated that certain actions having a symbolic stigmatizing effect could violate the Thirteenth Amendment.

must be assessed in terms of its "real meaning," as Justice Harlan put it, dissenting in Plessy.[13] That is just what this Court has been doing at least since Brown v. Board of Education. This Court has consistently recognized that elimination of racially stigmatizing state action was a central purpose of the post-Civil War Amendments.[14] See, e.g., Wright v. City of Emporia (1972) 407 U.S. 451, 466, 92 S. Ct. 2196, 2205. CF. Norwood v. Harrison (1973) 413 U.S. 455, 93 S. Ct. 2804; Reed v. Rhodes (6th Cir. 1980)

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[13](163 U.S. at 558, 16 S. Ct. at 1146.)

[14]See also Rose v. Mitchell (1979) 443 U.S. 545, 99 S. Ct. 2993, at 2999; City of Richmond v. United States (1975) 422 U.S. 358, 95 S. Ct. 2296, 2307 ("gross racial slur"); Columbus Board of Education v. Penick (1979) 439 U.S. 1348, 99 S. Ct. 2982, at 2992. (Rehnquist and Powell, JJ, dissenting) ("stigma"); Regents v. Bakke (1978) 438 U.S. 265, 98 S. Ct. 2733, at 2783 (Brennan, White, Marshall and Blackmun, JJ, concurring).

607 F.2d 714, cert. denied 445 U.S. 935, 100 S. Ct. 1329.

B. The "harmony-tranquility" clause as it relates to racial strife "in" California's "public schools," invalidates the whole of Proposition 1.

1. It is doubtful that any law more offensive on its face to the Fourteenth Amendment has come to this Court for review since Loving v. Virginia (1967) 388 U.S. 1, 87 S. Ct. 1817. Most segregation laws stigmatized minorities, not so much in terms, but inferentially in the racial classifications they embodied. Here, the language on the face of the Proposition itself stigmatizes minorities, especially children. No argument is required to demonstrate that a statutory provision that in its very words stigmatizes minorities is invalid. Nor does it matter whether there was an underlying intent or purpose to stigmatize--the law

either stigmatizes or it does not. It would be a constitutional absurdity to uphold a stigmatizing law for lack of proof of such intent or purpose--the harm is exactly the same whether the authors intended to stigmatize, acted in reckless disregard of the effect of the language, or were simply negligent or totally unthinking. Moreover, this is not a "disproportionate impact" situation; Proposition 1 is a racial law and as such discriminatory intent should be conclusively presumed. See, e.g., Personnel Adm'r v. Feeney (1979)--U.S.--, 99 S. Ct. 2282.

Accordingly, there is no need here for undertaking a "sensitive inquiry" into direct or circumstantial evidence of "purpose" or "intent". (Arlington Heights v. Metro Housing Auth., supra, 429 U.S. at 266, 97 S. Ct. at 564.) But assuming there is, the controlling

principle is that "for the purpose of discovering the mind of the legislature," a "law is the best expositor of itself" (Pennington v. Coxe (1804) 1 U.S. (2 Cr.) 346, 348) (Marshall, C. J.). Purpose and intent may be derived from the very language of a statute, a rule long followed in this Court and in the California Courts as well.[15] No further inquiry is required or warranted.[16]

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[15]Philbrook v. Glodgett (1975) 421 U.S. 707, 95 S. Ct. 1893, 1898; Boys Market v. Retail Clerks Union (1970) 398 U.S. 235, 90 S. Ct. 1583, 1592; Richards v. United States (1962) 369 U.S. 1, 9, 11, 82 S. Ct. 585, 591-592; CF. Watt v. Energy Action Ed. Foundation (No. 81-1464, 12/1/81) --U.S.--,--S. Ct.--; Moyer v. Workmen's Compensation Appl. Board (1973) 10 Cal.3d 222, 110 Cal. Rptr. 370, 373-374; Prouty v. Bank of Am. (1974) 37 Cal.App.3d 430, 112 Cal.Rptr. 370, 373, 374; Rosenthal v. Hansen (1973) 34 Cal.App.3d 754, 110 Cal.Rptr. 257, 261; People v. Fowler (1938) 32 Cal.App.2d Supp. 737, 84 Pac.2d 326.

[16]The compelling public interest in eliminating racial strife "in this state" also is an invalid purpose and objective. This language appears to refer to majority community hostility to desegregation. CF. Buchanan v. Warley, Brown v. Board of Education (II), Cooper v. Aaron, and Watson

(Footnote continued on the next page.)

II. The unlimited geographic reach of Proposition 1's repeal of the prior state consitutional requirement demonstrates that the "compelling public interests" were not the real reasons for its adoption, and that the real reason was segregation for its own sake.

A. The reach of Proposition 1's repeal of the prior state duty to desegregate is by no means limited to Los Angeles, nor was it intended to be. The Legislature intended Proposition 1

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v. Memphis, all supra, and Penick v. Columbus Board of Education (S.D.Oh. 1977) 429 F.Supp. 229, 253-254, aff'd (6th Cir. 1978) 583 F.2d 787, aff'd (1979) 443 U.S. 449, 99 S. Ct. 2941. While those decisions rejected community hostility as a reason to deny or delay admitted federal rights, the same principle has been applied in determining whether school desegregation is de facto or de jure. Courts have held that proof of refusal to desegregate because of community hostility is itself evidence of a de jure intent. Even cross-district busing has been ordered based upon that principle. See, e.g., United States v. School District of Omaha (8th Cir. 1975) 521 F.2d 530, 539, 541, 544, cert. denied 423 U.S. 946, 96 S. Ct. 361; United States v. Missouri (8th Cir. 1975) 515 F.2d 1365, 1367, (crossdistrict busing); United States v. Board of Sch. Comm'rs of Indianapolis (7th Cir. 1980) 637 F.2d 1101, cert. denied 449 U.S. 838,--S. Ct.--, aff'g (S.D. Ind. 1978) 456 F.Supp. (Footnote continued on the next page.)

to halt and prevent desegregation throughout the State of California.[17] The "reach of" Proposition 1 is "far in excess of its justificable purposes" (if any). CF. Lalli v. Lalli (1978) 493 U.S. 259, 273, 99 S. Ct. 518, 527. Since that is so, "This Court need not . . . accept at face value assertions of legislative

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183 (same); Accord: Tinsley v. Palo Alto Unified School Distict (I) 91 Cal.App.3d 841, 154 Cal.Rptr. 591; Stanton v. Sequoia High School District (N.D. Calif. 1976) 408 F.2d F.Supp. 502, 518; Morgan v. Kerigan (1st Cir. 1974) 509 F.2d 580, 587. Cf., Griffin v. Prince Edward City School Board (1964) 377 U.S. 218, 231, 84 S. Ct. 1226, 1233.

These decisions make perfect sense; racial hostility toward minority groups was one of the basic problems the Fourteenth Amendment was designed to deal with. (E.g., Strauder v. West Virginia, supra, 100 U.S. 303, 25 L.Ed. 664, Rose v. Mitchell, supra. And, if pandering to majority hostility is itself evidence of de jure intent, that same hostility hardly can be a valid reason not to desegregate, even de facto circumstances.

[17]Proposition 1, ¶ 1 ("any public . . . board"); Ballot Pamphlet, pp. 6, 9.

purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Weisenfeld, 420 U.S. 636, 648 n. 16, 95 S. Ct. 1225, 1233 n. 16; Orr v. Orr (1979) 440 U.S. 268, 280 n. 10, 98 S. Ct. 1102, 1112 n. 10; Califano v. Westcott (1979) 443 U.S. 76, 99 S. Ct. 2655, 2662-2663; Michael M. v. Superior Court (1981) 450 U.S. 464, 101 S. Ct. 1200, 1205. Nor does it matter which scope of review is applied to Proposition 1's "repealing" paragraph--"strict scrutiny," "intermediate scrutiny" (as in the foregoing cited cases), or merely "rational basis"[18]. Under any level of review the reach of Proposition 1

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[18]The modern "rational basis" test is set forth in Schweiker v. Wilson (1981) 450 U.S. 221, 101 S. Ct. 1074, 1080, 1082, 1083.

cannot be justified by any of the enumerated "compelling interests" or any other "interests" that the court below invoked (see infra, p. 33, note 31).

B. Proposition 1 relieves school boards, not merely of the duty to "bus", but also of any duty "with respect to the use of pupil school assignment." This is a more far-reaching provision than the "transportation" limitation. It eliminates any duty of school boards to alleviate de facto segregation by any means that possibly could achieve that result in all or virtually all circumstances. The various methods of desegregation which the court below believed were still available[19] all involve pupil "assignment" and thus there is no duty left to use any

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[19]113 Cal.App.3d at 648, 651, 652, 170 Cal.Rptr. at 505, 507, referring to statements in Crawford (I) (1976) 17 Cal.3d 280, 286, 305 and n. 17, 130 Cal.Rptr. 724, 726-727, 740 and n. 17.

of those methods. The result is that Proposition 1 exonerates every school board from any duty to transfer pupils to a school even two blocks farther away from home and to which pupils can walk; or to schools to which they can safely bicycle, let alone to schools to which they can be bused in a very few minutes over a very few miles.

That being so, the "compelling interests" can not have been the reason for the Proposition's enactment. Assignments which do not involve the use of busing, or which in part do involve busing but only for a few minutes over short distances to reasonably nearby schools, would not jeopardize the "health and safety of all [or any] public school pupils" by long bus rides on dangerous roads; would not hamper the "ability of parents to participate in the educational

process"[20]; would not "waste . . . scarce fuel resources," would not damage "the environment" by automobile exhaust pollution,[21] and would not interfere with "making the most effective use of the limited financial resources now and prospectively available to support public education." (Indeed, the reverse probably is true.) Finally, whatever is meant by the vague phrase "maximizing the educational opportunities for all public school pupils,"[22] it is difficult to see how that objective could be impaired by reassigning pupils to schools within walking or bicycling distance or within short bus riding distances. Accordingly, Proposition 1's real purpose and objective must be segregation for its own

[20]Compare Cal.Ed. Code §§ 37000.5, 37001.

[21]This "interest" was not mentioned by the court below as justifying the proposition.

[22]See United States v. Board of School Commissioners of Indianapolis, supra, 503 F.2d at 84.

sake--an invalid purpose and objective, needless to say.[23] (See II (C), infra pp. 38.)

C. Tinsley v. Palo Alto Unified Sch. Dist. (II), now pending before the California Court of Appeal, First District (San Francisco) No. 1 Civil 50997, stayed pending this Court's decision in Crawford

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[23]Petitioners Crawford et al. should be permitted to take advantage of the application of Proposition 1 to other school distict situations, even assuming some of the "compelling interests" may apply to Los Angeles. As in First Amendment cases (Village of Schaumberg v. Citizens, supra, 440 U.S. 620, 100 S. Ct. 826, 834-835), the "overbreadth" of the Proposition will necessarily have a "chilling effect" upon other school districts, and thus deprive children in those other districts of equal protection rights at least as important as First Amendment rights. CF. Harlan, J., concurring in McLaughlin v. Florida (1964) 379 U.S 184, at 197, 85 S. Ct. 283, at 291: "The fact that these cases [involving "necessity"] arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the states only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination--prohibition of which lies at the very heart of the Fourteenth Amendment." (Emphasis added)

(II), is an example of the overreaching aspect of Proposition 1. Tinsley demonstrates that the discussion in II(B) just above is not addressed to purely hypothetical situations.

In Tinsley (I) (1979) 91 Cal.App.3d 871, 154 Cal.Rptr. 591, hearing denied by California Supreme Court, the Court of Appeal held that the State Constitution required inter-district desegregation upon proof that minority school children were racially isolated. Of the elementary schools in the Ravenswood City School District (a minority enclave surrounded by affluent "white" districts in the Mid Peninsula),[24] four each had 98% minority enrollment and the fifth had 73%. A map of all the involved school districts lodged by Amici with the Clerk of this Court as Exhibit A to this brief

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[24]An area 20-30 miles south of San Francisco.

can be judically noticed here inasmuch as the California Court did so. (91 Cal.App.3d at 891, 154 Cal.Rptr. at 603.)

The map shows that the diameter of the total area encompassing all the elementary school districts is only 12 miles measured east to west, and 12 and 3/4 miles measured north to south. The practical distances are much less, e.g., as the crow flies, 4 miles from the center point of the segregated Ravenswood District to the center point of the Palo Alto District; 3 miles from the center point of the Ravenswood District to the center point of the Menlo Park District; and only 7 miles from the center points of each of the two districts the greatest distance from Ravenswood (Portola Valley and Woodside) to the center point of Ravenswood. Moreover, the distances from the Ravenswood District to the closest other districts are so short

that obviously it is entirely feasible for some pupils living in four of the defendant districts--Ravenswood, Palo Alto, Redwood City and Menlo Park--to bicycle to and from schools in the other districts quickly and safely.[25]

The Court of Appeal also noted comparative standardized performance test scores "for the school years 1974-1975

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[25]In the appeal in Tinsley (II) Amici advised the Court of Appeal as follows:

> Although U.S. 101, the Bayshore Freeway, separates East Palo Alto [where the segregated Ravenswood District is located] from Palo Alto and parts of Menlo Park, there are three easily accessible overpasses. The Court may judicially notice these physical facts. In fact, which can be proved at trial and is indisputable (although not reflected in this record), black children living in the Ravenswood District attend several elementary schools outside the Ravenswood District, e.g., St. Albert the Great Catholic Church School located in Palo Alto, and Nativity Catholic Church School located in Menlo Park, and transport themselves there by bicycle. (Emphasis in the original) (Appellant's Closing Brief, Tinsley et al. v. Palo Alto Unified School District et al., pp. 3-4, filed June 26, 1981 in Court of Appeal, First District, Division One, No. 1 Civil 50997.

and 1975-1976," and summarized the results (91 Cal.App.3d at 893, note 12, 154 Cal. Rptr. at 605, note 12).[26] The 1975-1976 results were derived from Exhibit C to the amended complaint:

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[26]"In 1974-1975, the range of performance of Ravenswood pupils was from the 3rd to 16th percentile as compared to a range of 43rd to 97th percentile in the other elementary schools. This discrepancy is emphasized if Redwood City (45th to 64th percentile) is omitted, because the remaining districts' students ranged from the 78th to the 97th percentile."

"In 1975-1976, the commensurate figures were from 4th to 34th percentile for Ravenswood district as compared to a range from 45th to 97th for pupils of the other schools--71st to 97th if Redwood City district is disregarded."

Profiles of School District Performance
California State Testing Program,
Expressed in State Percentiles

[1975-1976]

	Grade 2 Reading	Grade 3 Reading	Grade 6 Reading	Grade 6 Language	Grade 6 Spelling	Grade 6 Mathematics
Ravenswood	34	15	4	7	23	5
Palo Alto	95	91	95	94	92	95
Belmont	93	87	87	81	84	88
Las Lomitas	91	93	93	96	94	94
Menlo Park	96	88	96	97	96	94
Portola Valley	90	96	95	93	88	93
Redwood City	68	45	63	62	71	71
San Carlos	89	92	85	86	71	79
Woodside	82	97	90	86	86	94[27]

[27]The statistics for the school years 1978-1979 and 1979-1980 were attached to Amici's closing brief in the Court of Appeal. A copy of that Exhibit B has also been lodged with the Clerk of this Court as Exhibit B to this Brief. The figures for those two school years are about equally dismal.

The "Mid-Peninsula," where Tinsley was filed, is a suburban area, populated largely by highly educated upper and and middle class[28] professional, scientific, and technical people, and has highly desirable and successful schools (except Ravenswood). There is no reason to believe that desegregation in this area would lead to resegregation. The percentage of minority children is sufficiently low[29] that there is no reason for any school to reach the so-called "tipping point" that might result in "white flight." Desegregation was effectively accomplished in the area's

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[28]Compare Brennan, J., concurring in part in United Jewish Organizations v. Carey (1977) 430 U.S. 144, 174, 97 S. Ct. 996, 1014.

[29]For example, the total pupil population in the 8 South San Mateo County elementary districts was 19,553 (compare with 650,000 in Los Angeles), of which only 3,046 (15.5%) are minority, mostly concentrated in the defendant Ravenswood District (1976-1977 figures).

high schools,[30] and there is no reason to assume elementary desegregation could not succeed to a significant degree.[31]

The educational facts alleged in Tinsley show that desegregation is not pursued out of misplaced zeal for social experimentation, but is educationally necessary if the minority Ravenswood children ever are to break out of the cycle of miseducation to which they have been subjected for many years. But the Legislature, well aware of the educational crisis in Ravenswood, nonetheless intended

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[30]Tinsley (I), 91 Cal.App.3d at 897, 154 Cal.Rptr. at 607.

[31]The Court below said that voters "could" have been motivated by the concerns expressed by the dissent in Estes v. Dallas NAACP (1980) 444 U.S. 437, 100 S. Ct. 716, at 723. (113 Cal.App.3d at 655, 170 Cal.Rptr. at 509.) But the dissent was speaking of vast cities with "majority" populations in the minority and other problems not likely to occur in the Mid-Peninsula; it noted that conditions vary widely so that desegregation orders "must be drawn in the light of the circumstances present and the options available, . . . taking into account the practicalities of the situation." That is just what Proposition 1 fails to do. Far

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to freeze in segregation there (see Ballot Pamphlet). Whatever may be true of Los Angeles, the Legislature and People of California had no reason to deliberately perpetuate de facto segregation in the Mid-Peninsula, other than a desire to perpetuate racial segregation for its own sake.

D. It cannot be disputed that Proposition 1's repeal of the prior California constitutional requirement is

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from disapproving any busing, the dissent approved of a plan that would have bused 20,000 pupils in Dallas, saying it "does have promise for success" (100 U.S. at 721).

"state action."[32] Many cases hold that in racial segregation contexts the Fourteenth Amendment may be violated by a state law repealing prior laws. Griffin v. Prince Ed. Cty. Sch. Bd. (1964) 377 U.S. 218, 222, 229-230, 231, 84 S. Ct. 1226, 1228, 1232, 1233 (state law repealing compulsory school attendance law, thus permitting school closure, invalid); Hall v. St. Helena Parish Sch. Bd. (E. D. La. 1961) 197 F.Supp. 649 (three-judge court), aff'd per curiam (1962) 368 U.S. 515, 82 S. Ct. 429 (same); Gomillion v. Lightfoot (1960) 364 U.S. 339, 344-345, 81 S. Ct. 125, 128-129 (state's power to repeal laws limited by federal Constutition); Rice v. Elmore (4th Cir. 1947) 165 F.2d 387, certiorari denied 333

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[32]"The test is not the form in which state power has been applied, but, whatever the form, whether such power has been exercised." New York Times v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 718 (emphasis added) (The "repealing" provision of Proposition 1 is in its first paragraph.)

U.S. 875, and the long series of other "white primary" case[33] United States v. Bd. of Sch. Comm'rs of Indianapolis (7th Cir. 1978) 573 F.2d 400, 406-407, cert. denied sub nom Bowen v. United States (1978) 439 U.S. 824, 99 S. Ct. 93, on remand (S.D. Ind. 1978) 456 F.Supp. 183, affirmed (7th Cir. 1980), 637 F.2d 1101, 1108, cert. denied 449 U.S. 838,--S. Ct.--; Lee v. Nyquist (W.D. N.Y. 1970) 318 F. Supp. 710 (three-judge court), aff'd per curiam 402 U.S. 935, 91 S. Ct. 1618; School Comm'rs of Springfield v. State Board (1974) 366 Mass. 315, 319 NE 2d 427, cert. denied (421 U.S. 947, 95 S. Ct. 1673[4]; see also

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[33]E.g., Smith v. Allwright (1944) 321 U.S. 649, 64 S. Ct. 757; Terry v. Adams (1953) 345 U.S. 461, 73 S. Ct. 809. See Gunther, Constutitional Law, Cases & Materials, pp. 927-929 (9th Ed. 1975).

[34]In Lee v. Nyquist and Springfield the courts considered and rejected claims that the repeals of state board powers to order de facto

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Hadnott v. Amos (1969) 394 U.S. 348, 89 S. Ct. 1101, 1115-1117.[35]

Repealing statutes have been invalidated in non-racial contexts as well.[36]

The principle of these cases is that even a repealer must have a valid purpose or object. In Griffin v. Prince Ed. Cty. Sch. Bd., this Court, noting that "the Assembly repealed Virginia's compulsory [school] attendance laws", held

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desegregation were valid because there was no underlying federal duty to desegregate in the de facto context.

[35]In Hadnott v. Amos this Court, under § 5 of the Voting Rights Act of 1964 (42 U.S.C. § 1973c), nullified a state voting law amendment that repealed an exemption available under a prior law. Section 5 could not have been upheld as applied to a repealer unless the Court agreed with Congress that a repealer could violate the Fifteenth Amendment.

[36]E.g., United States Trust Co. v. New Jersey (1977) 421 U.S. 1, 97 S. Ct. 1050 (repeal violated contract clause); Gelpeche v. Dubuque (1867) 68 U.S. (1 Wall.) 175, 17 L.Ed. 520, 525 (same); Truax v. Corrigan (1921) 257 U.S. 312, 331, 334, 341-342, 42 S. Ct. 124, 129-130, 133 (treating law as pro tanto repeal of state court's general jurisdiction statute; denied equal protection.

(377 U.S. at 231, 84 S. Ct. at 1233):

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. (emphasis added)

The real purpose and object of California's repeal of the prior state constitution was to maintain segregation for its own sake; that "object" is not "a constitutional one"; therefore the Proposition violates the Fourteenth Amendment.

2. Respondent is expected to argue here that a state has carte blanche to repeal a law requiring de facto desegregation, because the prior law was not required to be enacted by the Fourteenth Amendment. We concede arguendo[37] that the repealed California constitutional

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[37]"Arguendo" only because California Supreme Court said in 1976 that "most of the currently segregated school systems in California would in all probability be found to be de jure segregated . . . ." Crawford v. Bd. of Ed. of Los Angeles (I) (1976) 17 Cal.3d 280, 301, 130 Cal.Rptr. 724, 737.

rule was not required by the Fourteenth Amendment, but the conclusion that it may be repealed at will is fallacious. Respondents may rely upon Dayton Bd. of Ed. v. Brinkman (I) (1977) 433 U.S. 406, 413-414, 97 S. Ct. 2766, 2772, and Id. (1979) 443 U.S. 526, 99 S. Ct. 2971, at 2976 n. 5 (Dayton II). But the Dayton cases do not support respondent's arguments.

Before passing on the validity of the school board's rescission of a resolution, this Court said in Dayton (I) that:

> The Board has not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. Reitman v. Mulkey 387 U.S. 369, 87 S. Ct. 1627, 18 L.Ed. 2d 830 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. (Emphasis added)

Only after thus carefully distinguishing the Dayton rescission of a mea culpa

resolution from the Reitman situation did this Court then hold that "We agree with the Court of Appeals' treatment of this action, wherein that Court said: 'If the [school] board was not under such a [federal constitutional] duty [to adopt the repealed resolution in the first place], then the rescission of the initial action in and of itself[38] cannot be a constitutional violation.'" Accordingly, far from having held that repeal of a law like the prior California constitution is valid if the State had no federal duty to enact it initially, this Court's "Reitman caveat" may be read to imply the broad principle (which

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[38]It should be kept in mind that Proposition 1 does much more than repeal the prior state constitutional interpretation; it also enacts positive law in its various provisions. The positive enactment is, needless to say, subject to review under the Fourteenth Amendment. Reitman v. Mulkey (1967) 387 U.S. 369; Hunter v. Erickson (1969) 393 U.S. 385, 89 S. Ct. 557. See Arguments I, supra, and III, infra.

Amici do not believe need be invoked here) that such an "operative" law cannot ever be repealed under any circumstances. The court below overlooked the Reitman caveat.[39]

Even ignoring the Reitman caveat, all the Dayton cases say is that a repeal "in and of itself"--i.e., without regard to its purpose, objective, or effect--"cannot be a constitutional violation." But a repeal still is subject to review for impermissible purpose or objective. Associated Gen'l Contractors v. S.F. Un. Sch. Dist. (9th Cir. 1981) 616 F.2d 1381, at 1390-1391, cert. denied.

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[39]113 Cal.App.3d at 653, 170 Cal.Rptr. at 508. Contrast NAACP v. Lansing Sch. Bd. (6th Cir. 1977) 559 F.2d 1042 n. 10, which read Dayton I correctly.

This Court in Dayton II made a statement similar to that in Dayton I but without the "Reitman caveat." But the reference was to the same resolution, and we assume the Dayton II footnote was not intended to overrule the Reitman reservation in Dayton I.

On that basis, Proposition 1 cannot survive. (Supra, Arg. I, II(A), (B), and III infra.)

If the Dayton cases really meant that any equal rights law could be repealed at will, absent a preexisting duty to enact the repealed law, that would have been inconsistent not only with Reitman but also with other decisions cited above, including Griffin v. Prince Ed. Cty. Sch. Bd., supra. The State in Griffin was under no federal constitutional duty to operate public schools in the first place, but repeal of the compulsory school law was nonetheless invalidated. That was true also of the similar Louisiana law in Hall v. St. Helena

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[40]E.g., The United States v. Indianapolis cases, supra p. 36; Lee v. Nyquist, supra; School Commissioners of Springfield v. State Board, supra; United States Trust Co. v. New Jersey, supra note 36 p. 37.

Parish School Board, supra, and other cases as well.[40]

The repeal cases are simply a corollary of the more general principle that under the Equal Protection Clause of the Fourteenth Amendment, the validity of state action is measured, not by reference to an underlying federal constitutional duty, but by whether the state action itself treats persons equally. Thus, in Rose v. Mitchell, supra, 443 U.S. at 557 n. 7, 99 S. Ct. at 3001 n. 7, this Court said:

> The fact that there is no [federal] constitutional requirement that States institute prosecutions by means of an indictment returned by a grand jury, see Hurtado v. California 110 U.S. 516, 4 S. Ct. 292, 28 L.Ed. 232 (1884), does not relieve those States that do employ grand juries from complying with the commands of the Fourteenth Amendment in the operation of those [grand] juries.[41]

[41]See also, e.g., Sweatt v. Painter (1950) 339 U.S. 629, 70 S. Ct. 851 (banning discrimination in public law school state not under federal duty to

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In Williams v. Rhodes (1968) 393 U.S. 23, 89 S. Ct. 5, the Court invalidated under the Equal Protection Clause a discriminatory state law regulating Presidential primary elections. Not only was there no underlying federal duty requiring the State to hold such elections, but also the federal constitution itself vests apparently unrestrained power to appoint Presidential electors "in such manner as the Legislature thereof may direct . . . ." (Art. II § 1 cl. 2). This Court held that was irrelevant (393 U.S. at 28-29, 80 S. Ct. at 9-10). Justice Harlan, concurring, agreed. (393 U.S. at 42, 89 S. Ct. at 16.)

The foregoing is not just another way of saying a de facto desegregation

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maintain); McLaurin v. Oklahoma Regents (1950) 339 U.S. 637, 70 S. Ct. 851 (same, segregated seating in graduate school classes). Brown v. Board of Education itself was an application of this principle.

law never can be repealed. Perhaps it can, if the repeal has a permissible purpose or objective. The situation here is no different than it would have been had California never adopted its prior requirement, but the state Legislature voted to not require any desegregation and openly declared its purpose was to maintain segregation for its own sake. In that case, such "inaction" with a discriminatory purpose would violate the Fourteenth Amendment. Arlington Heights, supra. The only difference here is that proof of a discriminatory purpose or objective exists, while in the inaction case proof would be difficult absent something like an official statement of illicit purpose. Arlington Heights, supra.

III. The purported "incorporation" by Proposition 1 of the federal "de facto"-"de jure" classification does not save its constitutionality, and other classifications and provisions in the Proposition also violate the 14th Amendment.

The court below held that "Proposition 1 embraces the protection of the Fourteenth Amendment and does not seek to violate it," and again--"we do not believe a state constitutional amendment can be said to violate the Fourteenth Amendment by specifically embracing it" (113 Cal.App.3d at 653, 654, 170 Cal.Rptr. at 508, 509).[42] The Court of Appeal's holding seems to be a syllogism, i.e., (a) any state law that "embraces" the 14th Amendment cannot violate that Amendment; (b) Proposition 1 does "embrace" the 14th Amendment; and (c) ergo, Proposition 1 cannot and does

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[42]"But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective," verb or gerund. Cardozo, J., dissenting in Carter v Carter Coal Co. (1936) 298 U.S. 238, 327.

not violate the 14th Amendment. The logic is faulty. The major premise is incorrect, because there is no rule of law that a state enactment is valid ipso facto because it incorporates, borrows, or "embraces" a federal enactment. And the minor premise (not articulated in the quoted statement) is wrong because (1) a key provision of Proposition 1 does not adopt the "de jure"-"de facto" classification at all but is a different invalid classification; (2) another provision affirmatively encourages the perpetuation of both de jure and de facto segregation; and (3) other provisions also encourage de jure segregation by misleading school boards as to their federal constitutional duties. (See also Arguments I and II, supra.)

A. A state law incorporating a federal classification must stand or fall on its own merits, and if the law is invalid, the fact of incorporation is irrelevant.

1. The "Swann"[43] cases are directly in point. In North Carolina State Bd of Ed. v Swann a state law purported to adopt the "color blind" rule of Brown v Board of Education; in invalidating the law, Chief Justice Burger, for the Court, did not deny that was the rule of Brown, but held (402 U.S. at 45-46, 91 S. Ct. at 1286):

> The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the Swann case. But more important, the statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind";

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[43] Swann v Charlotte-Mecklenburg Bd of Ed (1971) 402 U.S. 1, 91 S. Ct. 1267; McDaniel v Baressi (1971) 402 U.S. 39, 91 S. Ct. 1287; North Carolina v Swann (1971) 402 U.S. 43, 91 S. Ct. 1284.

> that requirement, against the background of segregation, would render illusory the promise of Brown v Board of Education. (Emphasis added.)

In short, the purpose and effect of the state law incorporating the Brown rule were inconsistent with that rule itself. The Swann situation is precisely analogous to the incorporation here of the "de jure-de facto" classification. It was surely no part of the purpose of the 14th Amendment to permit states by law to stigmatize minorities (Argument I, supra); or affirmatively to act to perpetuate segregation for its own sake (Argument II, supra)[44] or otherwise to impinge upon Equal Protection rights (see infra III (B) and (C)).

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[44]Under this Court's decisions pure de facto segregation in school is not reached by the 14th Amendment, but that Amendment does not sanction, approve of, or encourage its perpetuation. It is merely neutral toward it, and a state also must observe "strict neutrality" toward de facto segregation. Cf., Norwood v Harrison (1973) 413 U.S. 455, 93 S. Ct. 2804 (private segregation not reached by 14th Amendment but state may not in any way support or encourage it). See infra III (C).

2. This Court also has held in other contexts that incorporation by state law of a federal classification does not automatically validate that law[45]. And see Murphy and Rutledge, JJ., concurring in Oyama v California (1948) 332 U.S. 633, 68 S. Ct. 269, 277, 282, 284[46]. In Fujii v California (1952)

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[45]E.g., Reynolds v Sims (1946) 377 U.S. 533, 84 S. Ct. 1362, 1386-1389; Lucas v 44th Gen. Assem. of Colorado (1964) 377 U.S. 713, 84 S. Ct. 1459, 1479 (both rejecting "federal analogy" argument that one house of state legislature may be based on counties, not population); see Takahashi v Fish & Game Comm (1948) 334 U.S. 410, 68 S. Ct. 1138; Hampton v Mow Sun Wong (1976) 426 U.S. 88, 96 S. Ct. 1895, 1903-05 (power over aliens); Matthews v Diaz (1976) 426 U.S. 67, 96 S. Ct. 1883, 1894 (same).

[46]"What may be reasonable and constitutional for Congress for one purpose may not be reasonable or constitutional for a state legislature for another and wholly distinct purpose. Otherwise, there would be few practical limitations to the power of a state to discriminate among those within its jurisdiction.****

"In other words, if a state wishes to borrow a federal classification, it must seek to rationalize the adopted distinction in the new setting. Is the distinction a reasonable one for the purposes for which the state desires to use it? To that question it is no answer that the distinction was taken

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38 Cal.2d 718, 242 Pac.2d 617, 627, cert denied, the court invalidated under the 14th Amendment the state "Alien Land Law" incorporating a presumably valid federal classification discriminating against Japanese, and held:

> [I]f a state wishes to borrow a federal system of grouping [i.e., classification], it must justify the adopted classification in its new [state] setting, and the state's use of the [federal] distinction must stand or fall on its own merits. (Emphasis added.)

See also Truax v Corrigan (1921) 257 U.S. 312, 340, 42 S. Ct. 124, 132 (state law incorporating Clayton Act in "same words" limiting state court jurisdiction denied equal protection); Senn v Tile Layer's

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from a federal statute or that the distinction may be rationalized for the purpose for which Congress used it. The state's use of the distinction must stand or fall on its own merits. And if it appears that the equal protection clause forbids the state from using the distinction for the desired purpose, the fact that Congress is free to adopt the distinction is some other connection gives the state no additional power to act upon it." (Emphasis added.)

Union (1937) 301 U.S. 468, 57 S. Ct. 857 (Brandeis, J., for the Court) (Wisconsin "Little Norris-LaGuardia Act" valid, but no mention at all of identical federal act adopted five years earlier)[47]; M Restaurants Inc. v S. F. Local Jt. Ex. Bd. (1981)--Cal. App.3d--, 177 Cal.Rptr. 690, 698, pet. for hrg. pending (California "Little Norris--LaGuardia Act" valid, not automatically because it incorporated federal act, but because it did not have purpose or effect different from federal act, was otherwise constitutional, and was consistent with overall federal labor policy).

B. Proposition 1's resegregation clause violates the 14th Amendment.

Assuming arguendo that the basic repeal of the former California desegregation requirement was valid, "it does not follow that there is no constitutional limit to the means which may be used to

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[47]Senn distinguished Truax without mentioning the Clayton Act issue in Truax.

enforce it" McLaughlin v Florida (1964) 379 U.S. 184, 195, 85 S. Ct. 283, 290; Oyama v California, supra, 332 U.S. at 646-647, 68 S. Ct. at 275. The means in Proposition 1's second paragraph are invalid.

Paragraph 2 of Proposition 1 (requiring reopening of judgments), is a resegregation clause and the heart of the law--without it mandatory desegregation already under way in Los Angeles could not have been stopped. It was the very provision invoked by respondent in the trial court below, yet the Court of Appeal failed to consider its full implications and effect.

Once a trial court reopens and sets aside a judgment, the school board is left by paragraph 2 with unfettered discretion to do as it arbitrarily pleases with the desegregated children. Paragraph 2--not containing any standards (except "the Constitution", see infra p. 57)--leaves school

boards free to require or "invite" the retransfer of desegregated children back to segregated schools. Exercise of either option as to minority children (we pass the issue of "majority" children) already attending "white" schools pursuant to the desegregation plan would stigmatize them solely because of their race by "singling them out" from all other ("majority") children attending those same schools--thus practically "affixing" a "brand upon them" "implying inferiority". Strauder v West Virginia, supra. Such a classification between "majority" children, who of course remain in their regular schools, and minority children already attending the same schools but retransferred back to "ghetto" schools, is patently void. Courts have uniformly held official resegregation unconstitutional[48].

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[48]E.g., Monroe v Bd of Comm'rs (1968) 391 U.S.
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Even if it is uncertain whether paragraph 2 ever will be applied in that manner, Paragraph 2 creates a risk of that happening and thus fails to "steer clear" of possible resegregation. Cf. Norwood v Harrison, supra; Gilmore v City of Montgomery (1974) 417 U.S. 556, 94 S. Ct. 2416. A law which has even the potential for official resegregation must be subject to "strict scrutiny" and, as in First Amendment cases (see supra, p. 26 note 23), courts will not presume that it "curtails constitutionally protected activity as

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450, 459, 88 S. Ct. 1700, 1705; Goss v Bd of Ed (1963) 373 U.S. 683, 686, 83 S. Ct. 1405, 1408; NAACP v Lansing Bd of Ed (6th Cir. 1972) 485 F.2d 569 (de facto situation, so far as then known); School Comm. of Springfield v State Board, supra (de facto); Reed v Rhodes (6th Cir. 1979) 607 F.2d 714, cert. denied; NAACP v Lansing Bd of Ed (1977) 559 F.2d 1042 (de jure); United States v Texas Ed. Agency (Austin) (5th Cir. 1977) 564 F.2d 162, 172; Clemmons v Bd. of Ed. (6th Cir. 1956) 228 F.2d 853, cert. denied; United States v Bd. of Sch. Comm'rs of Indianapolis, supra, 503 F.2d at 76, 77; Cf., Soria v Oxnard Sch. Dist (9th Cir. 1973) 467 F.2d 59, 60.

little as possible", and "it makes no difference whether such resegregation "would actually be commenced"; nor will it be "assumed" that "ambiguities will be resolved in favor of adequate protection of" 14th Amendment rights--"[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms". NAACP v Button (1963) 371 U.S. 415, 83 S. Ct. 328, 338, 339, 340. Further, "it will not do to say that the Constitution would prevent overbroad application" or that "judicial safeguards" will "neutralize the vice of a vague" and overbroad law. Baggett v Bullitt (1964) 377 U.S. 360, 84 S. Ct. 1316, 1323. Even to require minority children to appear in state courts to defend against possible official resegregation is a violation. Cf. Georgia v Rachel (1966) 384

U.S. 780, 86 S. Ct. 1783, 1796-1797[49].

Paragraph 2 is not saved by its prefatory clause "Except as may be precluded by the Constitution of the United States". Courts uniformly ignore such clauses, for to apply them would permit a legislature to immunize an entire law from effective judicial review merely by including such a disclaimer in the front of a whole act. See, e.g., Oregon v Mitchell (1970) 400 U.S. 112, 91 S. Ct. 260 ("except as required by the Constitution" not mentioned in 90 pages of opinions)[50].

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[49]Paragraph 2 also violates 42 U.S.C § 2000d (Title VI of 1964 Civil Rights Act); 42 U.S.C. § 1981; and 20 U.S.C. §§ 1703(a) and (e).

[50]See also the "interposition" laws, e.g., Arkansas law authorizing the Legislature to oppose the Brown decision in "every constitutional manner"; Aaron v Cooper (8th Cir. 1958) 261 F.2d 97; Aaron v McKinley (D. Ark. 1959) 173 F.Supp. 944 (3-judge court), aff'd per curiam 361 U.S. 197, 80 S. Ct. 291; Cooper v Aaron (1958) 358 U.S. 1, 78 S. Ct. 1401.

The Legislature could have explicitly said in paragraph 2 that minority children could not be

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C. Other provisions of Proposition 1 violate the 14th Amendment by misleading school boards as to their federal constitutional duties and otherwise encouraging the perpetuation of de facto and de jure segregation.

(1) The "compelling public interest" paragraph affirmatively encourages school boards to perpetuate de facto and de jure segregation.

The last paragraph of Proposition 1 states that the Legislature and People "find" and "declare" that the law is "necessary" to serve "compelling public interests", and then recites a litany of evils that supposedly flow from either "pupil transportation" or even "pupil assignment" (see Argument II, supra). The language admits of no exceptions or qualifications; it borders on an official command and expresses an official state policy

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resegregated: its failure so to do is suspicious. This, therefore, is a decidedly appropriate case for application of First Amendment rules quoted above from Baggett v Bullitt, supra (argument that "the Constitution" would prevent overbroad application rejected), and NAACP v Button, also quoted supra.

(see Peterson v Greenville (1963) 373 U.S. 244, 83 S. Ct. 1119; Lombard v Louisiana (1963) 373 U.S. 267, 83 S. Ct. 1122) that all desegregation is nothing but trouble, whatever minimal transportation or assignment is used. Indeed, unless local boards refuse to desegregate, the Legislative will expressed in ¶ 5 will be frustrated.

Such language is far from the "strictly neutral" requirement that a state must adhere to when it repeals equal rights laws by constitutional amendment. Harlan, J., concurring in Hunter v Erickson, supra, (1969) 393 U.S. at 395, 89 S. Ct. at 563; Reitman v Mulkey, supra. It violates the "fundamental principle" of the Equal Protection Clause that "the State must govern impartially". New York City Transit Authority v Beazer (1979) 440 U.S. 568, 587, 99 S. Ct. 1355, 1367. And

it is contrary to the absolutely clear mandate of this Court[51].

(2) Other provisions of Proposition 1 encourage de jure segregation by misleading school boards as to their federal duties and otherwise violate the 14th Amendment.

(a) Ostensibly, Proposition 1 affects only de jure cases brought in California courts to enforce the California constitution, but in practice it is necessarily a rule of conduct directed to school boards who are prospective parties before those courts. Proposition 1 will mislead school boards as to their 14th Amendment duties in several respects.

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[51]See Harlan J., for the Court, in Adickes v S.H. Kress (1970) 398 U.S. 144, 90 S. Ct. 1598, 1605: "Few principles are more firmly stitched into our constitutional fabric than the proposition that a State must not discriminate against a person because of his race . . . or in any way act to compel or encourage racial segregation" (emphasis added); Moose Lodge v Irvis (1972) 407 U.S. 163, 176-177, 92 S. Ct. 1965, 1973 (law did not "in any way foster or encourage racial discrimination" (Rehnquist, J., for the Court). Nor can a state by law "discourage" desegregation Robinson v Florida (1964) 378 U.S. 153, 84 S. Ct. 1693.

(i) The "facts . . . at the time" clause of ¶ 2 will lead school boards to believe that, in determining whether they have an "affirmative duty" to desegregate, they need not examine antecedent causes going back to 1954, but only the current or immediate past boards' "intent". Dayton Bd of Ed v Brinkman (II), supra; Columbus Bd of Ed v Penick (1979) 443 U.S. 449, 99 S. Ct. 2941.

(ii) Paragraph 1 limits state courts to correcting "specific" de jure "violations", and will suggest to school boards that they need not undertake "system-wide" remedies, even if segregation was "system-wide" in the past with system-wide effects, contrary to Keyes-Dayton II-Columbus (and even Dayton I).

(b) Paragraph 3 requires courts to give priority on the docket to applications for resegregation over all other civil actions--which includes other actions

seeking relief from de jure segregation in other school districts or from any other kind of racial discrimination, a non-neutral structuring of the state's judicial system (cf., Harlan, J., concurring in Hunter v Erickson; Rose v Mitchell), violating the 14th Amendment and 42 U.S.C. § 1981.

CONCLUSION

For all the reasons set forth above, Amici respectfully urge the Court to hold Proposition 1 unconstitutional under the Thirteenth and Fourteenth Amendments and, accordingly, to reverse the judgment of the California Court of Appeal, Second Appellate District.

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